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In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 9

GLASS CONTAINER ASSOCIATION OF AMERICA, INC., CHARLES R. STEVENSON AND EMORY G. ACKERMAN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM
THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF OF APPELLANTS.

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BRIEF OF APPELLANTS.

OPINION BELOW.

The opinion of the court below, the United States District Court for the Northern District of Ohio, Western Division, is reported in 46 Fed. Supp. 541.

JURISDICTION.

The jurisdiction of this Court to review the judgment of the District Court is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167; 15 U. S. C. sec. 29), and section 238 of the Judicial Code, as amended (136 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. sec. 345). Probable jurisdiction of this appeal was noted by this Court on March 1, 1943. The judgment of the District Court herein was entered on October 8, 1942, and the petition for appeal was filed on Dec. 3, 1942 and was allowed on Dec. 3, 1942.

STATUTES INVOLVED.

Sherman Act (Act of July 2, 1890, 26 Stat. 209, as amended Aug. 17, 1937, 50 Stat. 693); Section 1 (15 U. S. C. A. Sec. 1), Section 2 (15 U. S. C. A. Sec. 2), Section 4 (15 U. S. C. A. Sec. 4).

Sections 1 and 2 of the Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. Secs. 1 and 2, known as the Sherman Act, as amended by the Act of August 17, 1937, 50 Stat. 693, provide in part as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *.

STATEMENT.

The Parties.

The appellants are the Glass Container Association of America, Inc. (hereinafter for brevity styled "the GCA"), Charles R. Stevenson, its business manager from 1928 to date, and Emory G. Ackerman, its assistant business manager from 1929 to Dec. 31, 1940, when he resigned to become president of the Thatcher Manufacturing Co.

The Proceedings in the District Court.

This is an action instituted in the District Court by the United States against the appellants and various other defendants alleging a conspiracy in violation of the anti-trust laws of the United States to monopolize patents on glass-making machinery and the manufacture of such machinery and thereby to monopolize and restrain the manufacture and distribution of various types of glassware and

glass containers. The charges against the appellants are that since 1928 they have been parties to the conspiracy and have maintained and strengthened it by the acts described in the complaint. It is specifically charged that the appellant, the GCA, at the request of the defendants Hartford-Empire Company and Owens-Illinois Company, has from time to time dissuaded new firms from entering the glass industry and thereby improperly restricted the expansion thereof; that the appellants have engaged in "artificially and arbitrarily fixing, maintaining and affecting the price of glass containers"; that they have actively persuaded, induced and coerced manufacturers of glass containers not to sell any particular type thereof at less than the prices fixed by the company acting as price leader for that type; and, that they by means of a system of quotas and forecasts operated by the GCA, have improperly limited the production and distribution of glass containers. The District Court found that the appellants were parties to the conspiracy in two respects, to wit, in improperly restricting the production and distribution of glass containers by means of the quota and forecast system operated by the Association, and by improperly preventing the expansion of the glass industry by keeping newcomers from entering it. As to the charge that the appellants had tampered with the price structure of the industry, the District Court made no finding against the appellants, stating in its opinion that it felt that it was unnecessary for it to discuss this charge. The District Court by its judgment enjoined the appellants from further participation in the general conspiracy charged and specifically (a) enjoined the GCA from holding any further meetings of its Statistical Committee and from establishing any new committee with duties, of a similar nature; and directed the GCA to amend its by-laws so as to provide for the permanent abolition of the Statistical Committee or any committee having duties of a similar nature; (b) enjoined the GCA from continuing such of its present officers and board of directors who are

defendants herein or who are directors, officers or employees of any corporation defendant herein, in office; and further directed the GCA on notice to the Attorney General to submit the names of such officers and directors as may be elected or appointed to succeed such officers and directors to the District Court for its approval prior to their taking office; (c) enjoined the GCA from thereafter electing, employing or continuing in office or in its employ any person who is at the same time either an officer, director, agent or employee of any of the corporate defendants found to be parties to the conspiracy; and directed the GCA to cause its certificate of incorporation and by-laws to be amended so as to provide that no person may hold office or employment of any kind therein who is at the same time either an officer, director, agent or employee of any of the defendant corporations; and the District Court by its judgment (d) enjoined the GCA and the individual appellants from engaging in certain activities in the future operation of the GCA in the respects hereinafter particularly set forth and discussed.

The Business and Activities of the GCA.

The GCA was incorporated in 1919 under the laws of Delaware. Its certificate of incorporation provides that "the business and affairs of the corporation shall be conducted by the board of directors, executive committee and officers, as prescribed by the by-laws." The by-laws provide that the board of directors shall consist of fifteen persons, elected by the membership at the annual meeting, each member casting one vote; that the board may appoint an executive committee and may appoint or authorize the president to appoint such other committees, with such powers, as it shall authorize; that the officers shall be a president, two vice-presidents, a secretary, a treasurer, and a business manager, and such other officers as the board may appoint. The appellant Stevenson became business manager of the Association in May, 1928, and still holds

that position (R. V. 3461). The appellant, Ackerman, was employed as assistant business manager in 1929 and resigned on December 31, 1940, to become president of the Thatcher Manufacturing Company (R. V. 3461).

The membership of the GCA includes manufacturers of glass containers and of allied articles, such as caps and closures, and certain companies which supply raw materials and equipment to the glass container manufacturers (R. V. 3463). It is supported financially by assessments upon its membership, in most cases based upon a percentage of their sales; but in the case of companies other than manufacturers of glass containers, where the percentage of net sales method would work out inequitably (R. V. 3467), an arbitrary amount was agreed upon between such suppliers and the GCA (R. V. 3467). Prior to 1933, the membership of the GCA comprised manufacturers of about 82 per cent of the glass containers made in the United States; during the period of the NRA Code and thereafter, its membership has included the makers of more than 96 per cent of such containers (R. V. 3469).

The function of the GCA has been the promotion of the glass container industry, with particular emphasis upon improving the quality of its product and enlarging the market therefor (R. V. 3473-75). GCA Exhibit 5188 (R. V. 3553; 8543)* contains its profit and loss statements for the period 1928-1939, which set forth the substantial expenditures that it has made in carrying out those purposes. These include the maintenance of a research laboratory to develop methods of processing food products in glass (R. V. 3474); the expenditure of hundreds of thousands of dollars in advertising glass containers and conducting campaigns to point out their advantages over competitive containers made of tin, paper, plastics, or other materials (R. V. 3474); the conduct of research as to new uses for glass containers,

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* The record page number where each exhibit was introduced, and the record page where each exhibit may be found, is herein given.

including the maintenance of a glass kitchen for this purpose (R. V. 3474); the opposition to laws and regulations restricting the use of glass for certain purposes, as, for instance, storage of motor oils and other combustibles (R. V. 3474); the representation of the industry in its relationship with the railroads, to secure more favorable rates and classifications for its products and raw materials (R. V. 3474); the standardization of bottle finishes (the part of the bottle which receives the cap or closure) to permit different persons successfully to manufacture bottles, caps and closures to specifications and thereby to avoid wastage of the products packed (R. V. 3474); the standardization of the bottles themselves, to improve strength, to lessen weight, and to fit various types of packaging machinery (R. V. 3474); and the conduct of a statistical system which has assembled information concerning the quantity of glass containers produced, shipped, and on hand, for the information of the membership and of the public generally (R. V. 3475).

Foreword.

The appellants in this Court find themselves, as they did in the District Court, in a somewhat unusual position in the presentation of their case because a very small fraction of the evidence has anything at all to do with the issues which concern them. Even if the Court rejects our contention that the appellants have not by the evidence been connected with the conspiracy charged in the complaint, it must be conceded that their case is separate and distinct from that of the other defendants, a fact which was recognized by the District Court in its opinion when it stated that the situation of the GCA "differs from that of the other defendant corporations," and again, when discussing the relief to be granted, it said that "the Glass Container Association must be treated separately." The trial of this case in the District Court consumed 112 days;

the printed record contains 6810 pages of testimony and there are over three thousand exhibits; the issues relating to the appellants might have been tried within a few days. If the evidence which relates to the appellants can be reviewed unobscured by the great mass of other evidence in the record which does not relate to them at all, we believe this Court will readily perceive the absence of any showing that they have violated the law.

Specification of Errors.

1. The District Court erred in finding as a fact and concluding as a matter of law that the appellants were parties to the conspiracy charged, and in entering its judgment against them. (Assignments of Error Nos. 1, 2, 3, 30, 31, 32, 33, 34, 35, 36, 37, 38, 47.)

2. The District Court erred in finding as a fact and concluding as a matter of law that the appellants unlawfully and in furtherance of the conspiracy charged improperly restricted the production and distribution of glass containers by means of a system of forecasts operated by the GCA. (Assignments of Error Nos. 12, 13, 14, 17, 18, 20, 22, 23, 24, 27, 33, 41, 42, 43, 44, 45, 46, 50.)

3. The District Court erred in finding as a fact and concluding as a matter of law that the appellants unlawfully and in furtherance of the conspiracy charged improperly restricted the production and distribution of glass containers by means of a system of forecasts operated by the GCA, notwithstanding the fact that the undisputed evidence disclosed that the GCA had completely and voluntarily abandoned this practice before this action was instituted or it had knowledge thereof. (Assignments of Error No. 51.)

4. The District Court erred in finding as a fact and concluding as a matter of law that the appellants unlawfully and in furtherance of the conspiracy charged improperly limited the expansion of the glass industry by keeping

newcomers from entering it. (Assignments of Error Nos. 28, 34, 40, 48.)

5. The District Court erred in that there is no reasonable nor supportable basis in law or upon the evidence for its injunction against the appellants. (Assignments of Error No. 53.)

6. The District Court erred in that its order of injunction against the appellants is unreasonable and unnecessarily drastic and punitive in its nature, and imposes upon the future operations and activities of the GCA restrictions and limitations contrary to legal principles heretofore announced by this Court in generally similar cases. (Assignments of Error Nos. 8, 9, 10, 12, 13, 14, 15, 16, 17, 18.)

Summary of Argument.

It is the position of the appellants that there is no substantial evidence connecting them with the conspiracy charged; that there is no substantial evidence that the operations of the GCA were in violation of the anti-trust laws or in furtherance of the conspiracy charged; that, if the GCA, or the individual appellants indulged in any unlawful or objectionable practices, they were, upon the uncontroverted facts, voluntarily and completely abandoned before this action was instituted; that the District Court's judgment of injunction against the appellants is wholly unwarranted and, if otherwise justified, is unnecessarily and unreasonably drastic, and imposes restrictions upon the future activities of the GCA not warranted by the evidence and opposed to the law announced by this Court in generally similar cases.

Questions Presented.

1. Whether the appellants were parties to the conspiracy as it is charged in the complaint.

2. Whether there is any substantial evidence that the GCA and the individual appellants unlawfully and in fur-

therance of the conspiracy improperly restricted the production and distribution of glass containers by means of a system of forecasts operated by the GCA.

3. Whether the GCA, if it ever had improperly restricted the production and distribution of glass containers by the system of forecasts, had not completely and voluntarily abandoned this practice before this suit was instituted.

4. Whether there is any substantial evidence that the appellants, unlawfully and in furtherance of the conspiracy charged, improperly limited the expansion of the glass industry by keeping newcomers from entering it; and whether if it did so, its practices in that regard had not entirely ceased before this action was instituted.

5. Whether there is any reasonable or supportable basis in law and upon the evidence for the judgment of injunction of the District Court.

6. Whether, in any event, the injunction granted by the District Court is unreasonable and unnecessarily drastic and punitive in its nature and imposes upon the future operations and activities of the GCA restrictions and limitations contrary to legal principles heretofore announced by this Court in generally similar cases.

ARGUMENT.

POINT ONE.

THE APPELLANTS WERE NOT PARTIES TO THE CONSPIRACY AS IT IS CHARGED IN THE COMPLAINT.

Paragraph 175 of the complaint charges that the appellants have been, since 1928, "parties to the conspiracy, monopoly, and combination in restraint of trade hereinbefore alleged" and have created and extended them "by the acts and methods hereinbefore alleged." The reference to the "conspiracy, monopoly and combination in restraint of trade hereinbefore alleged" must be construed as pointing to the general conspiracy charged in paragraphs 34

and 35 of the complaint and defined more closely in the Government's response to motions by the defendants, Hartford and Owens, for bills of particulars.

In the complaint and these bills of particulars, the "general conspiracy" is described as a conspiracy to monopolize "(1) patents on automatic machinery for the production of pressed and blown glassware and glass containers; and (2) machinery for the production of pressed and blown glassware and glass containers, and the distribution of such machinery," and (3) "through the control of the patents on machinery for the production of pressed and blown glassware and glass containers, and through the control of (such) machinery" to effectuate a monopoly or combination in restraint of trade "in the manufacture and distribution of pressed and blown glassware, and * * * in the manufacture and distribution of glass containers." There is no evidence tending to prove this charge, or to establish any connection between the appellants and the patents covering glassmaking machinery or the machinery itself.

The Government charges that the alleged monopoly of patents and of glassmaking machinery has very largely centered in the defendant, Hartford-Empire Company. Four witnesses testified as to the relationship between Hartford and the GCA: Smith, Pease, Eldred (all of Hartford), and Ackerman (of the GCA). All of them agree that, while Hartford was a member of the GCA and was represented at some of its annual and semi-annual membership meetings, no Hartford man was ever an officer or director of the GCA; that Hartford was never active in the affairs of the GCA; and that there was no connection whatever between the GCA and Hartford's patent activities or licensing policies.

Thus, Smith testified at page R. II. 889 that he had attended one or two of the GCA's conventions but never any of its directors' meetings; at page R. II. 1288 that Hart-

ford's membership in the GCA was a limited or non-voting one; and at page R. II. 1256 that he had never talked to either Stevenson or Ackerman about the issuance of licenses under Hartford's patents or the extension of such licenses when granted. At page R. V. 3291, Pease confirmed Smith's testimony about the character of Hartford's membership in the GCA and said that the reason why Hartford's representatives attended GCA conventions was to keep in touch with and engender good-will among Hartford's licensees. At page R. V. 3421, Eldred testified that membership in the GCA was not a prerequisite to the granting of a license by Hartford.

At page R. V. 3554, Ackerman testified that Hartford's only participation in the activities of the GCA was its representation on two or three technical committees thereof, including the research committee and the committee on standard testing procedure. At page R. V. 3555 he testified that the GCA had nothing to do with the matter of patents or with the granting of licenses to members of the GCA; that his personal knowledge of the patent situation in the glass industry was only what he could gather from the trade papers; that membership in the GCA was not restricted to Hartford licensees; and that neither he nor the GCA had knowledge, in 1928 or at any other time, of any conspiracy or monopoly in connection with patents.

There is literally no evidence in the record which connects the GCA or the individual appellants with the patent situation in the industry or with the situation as to glass-making machinery or with any conspiracy affecting either; and we, therefore, submit that the Government has wholly failed to introduce any evidence to support its basic and fundamental charge against them.

POINT TWO.

THERE IS NO SUBSTANTIAL EVIDENCE THAT THE GCA AND THE INDIVIDUAL APPELLANTS UNLAWFULLY AND IN FURTHERANCE OF THE CONSPIRACY CHARGED IMPROPERLY RESTRICTED THE PRODUCTION AND DISTRIBUTION OF GLASS CONTAINERS BY MEANS OF A SYSTEM OF FORECASTS OPERATED BY THE GCA.

The principal attack of the Government against the appellants is centered upon this phase of the case, and the activities and operations of the GCA in this respect provided the principal basis of the judgment of the District Court.

The Government does not challenge the propriety of the collection and dissemination of the basic data which the GCA assembles. The monthly reports received from each member show the number of gross of glass containers of various classes which it has produced and shipped during the preceding month, and the number of gross of containers on hand at the end of that month (R. V. 3527). These reports do not now contain, nor have they ever contained, any statement of the dollar value of production, shipments, or stocks on hand, or any other information regarding the price of the merchandise produced, shipped or stocked (R. V. 3528). These reports are assembled by the GCA, which re-distributes to its membership, once a month, corresponding figures of production, shipments, and stocks on hand for the industry as a whole (R. V. 3528). The report which a particular member receives works out the percentage relationship between his own production, shipments, and stocks on hand and the corresponding industry totals (R. V. 3529), Government's Exhibits 600-606 (R. III. 1546-47, 13,211, Appendix A); but, except to the extent that members may voluntarily exchange this information (R. V. 3578-79), there is no disclosure of the figures of one company to any other company (R. V. 3578). In addition to this, the GCA receives an annual report from each member,

stating the total melting area of its furnaces, from which it computes the theoretical capacity of the industry on the basis of data concerning the number of square feet of melting area required to produce a ton of glass per day and the number of days per year during which the average furnace is in operation (R. V. 3527). The capacity figures thus developed, both for the individual company and for the industry as a whole, are then related in percentage to the production and shipment figures in the monthly reports distributed to the members during the ensuing year.

The GCA began collecting and distributing such figures in 1925, shortly after the decision of this Court in *Maple Flooring Manufacturers Association v. United States,* 268 U. S. 563; and the type of information with which it deals is limited to what has been approved in that and subsequent trade association cases, and is in fact much less complete and detailed than the statistical systems therein approved.

As heretofore stated, there can be no valid criticism of the basic data which the GCA collects and distributes, and the Government has in fact made none. Its sole challenge of our statistical system is based upon certain percentage forecasts which, from 1928 until 1939, the GCA set out on a statistical report received monthly by each member, summarizing the more detailed report which we have described above. The evidence regarding these percentage forecasts conclusively proves, however, that they did not constitute, as the Government claims, a system of production control by means of quotas. It also establishes that the whole idea of the forecasts became entirely dormant immediately following the invalidation of the NRA Code by the decision of this Court in *Schechter Corporation v. United States,* 295 U. S. 495 (1935), and was formally and voluntarily dropped in July, 1939, a number of months before the present suit was filed, when counsel for one of the members questioned their propriety.

The statistical sheets containing the forecasts which the Government has challenged were all similar to those sent to Knox Glass Associates, Inc. (R. V. 3529), which were introduced in evidence as Government's Exhibits 600 to 606 (R. III. 1546-47). For convenience, Government's Exhibit 600 has been reproduced as Appendix A to this brief, and each line on the Exhibit has been numbered for ease in discussing it. The evidence shows that reports similar to Government's Exhibit 600 began to be used late in 1928 or shortly thereafter (R. V. 3529), and that the purpose and history of their development were as follows:

At that time, and for a number of years thereafter, the capacity of the industry to produce glass containers was being utilized only to the extent of from 50 to 60 per cent (R. V. 3477). The pressure of this unused capacity was very great (R. V. 3561) for the reason that, in glass manufacture more than in most other types of production, the cost of operating a particular furnace is largely fixed and does not vary in proportion to volume of production (R. V. 3580). Thus it costs nearly as much to operate a furnace at fifty per cent of capacity as at one hundred per cent, but the dollar volume of sales is only half as large in the one case as in the other (R. V. 3580). The cost per bottle is therefore very much higher when a furnace is operating at a low rate of production than when it is operating at capacity (R. V. 3580). This situation created a temptation for each member of the industry to try to secure enough volume to operate his furnaces at capacity, which, since there was not enough to go around, would mean that some other company must go out of business (R. V. 3564).

The GCA sought to deal with this situation in two ways. The first, and by far the more important in point of dollars spent, was to widen the market for glass containers, thus filling up the unused capacity and removing the problems which it created (R. V. 3564). The second

was to preach to the industry the economic truism that no substantial part of the industry could expect, in this situation, to secure a substantial increase in its own percentage of the total industrial volume without driving others out of business and leaving the industry in a more chaotic situation than before (R. V. 3564). It was the hope of Stevenson and Ackerman that the members of the industry would individually recognize the truth of this principle and would individually and voluntarily act upon it; and that was the entire purport and content of the so-called Stevenson principle of "live and let live," or, as it was sometimes described, "the equitable sharing of the available business" (R. V. 3564).

Beginning late in 1928, the effort was made, through the statistical reports of the GCA, of which Exhibits 600 to 606 (R. II. 1546-47, 13,211, see Appendix A) are an example, to facilitate any efforts of an individual member to adopt this principle in the conduct of his own business by including data which would compare his current rate of shipments, in relation to the industry total, with his historical or normal position in the industry (R. V. 3566). Thus the predecessor of the percentage forecast appearing at line 3 of Exhibit 600 (R. III. 1546, Appendix A) was developed by the GCA staff, taking into account both the past relationship of the particular member's shipments to the industry total and his capacity to produce, in relation to total industry capacity (R. V. 3567). The multiplication of the member's percentage forecast by the actual industry shipments for the prior period produced the member's individual forecast in terms of gross (R. V. 3535-36, and see Government's Exhibits 1390-1485, R. V. 3532, item "3").

All the witnesses who have testified on this subject have stated categorically that, neither before nor after the Code, was there any agreement or understanding, formal or informal, that members would abide by their forecasts and would not manufacture or sell a larger number of gross, or

any attempt to police or enforce them (Ackerman, R. V. 3565-3573; Underwood, R. III. 1548-49; Dugan, R. III. 2026; Rieman, R. III. 2061; Levis, R. III. 2228). Government's Exhibits 1390-1485 (R. V. 3532) establish, moreover, that even during this early period, the members did not in fact adhere to their percentage forecasts, and that, on the contrary, their actual shipments departed widely therefrom.[1] Thus, in 1933 (the last full year unaffected by the Code[2]), after the system of publishing forecasts had been in effect five years, 25 companies were reporting their general line sales to the GCA. Of these, the sales of only 5 were within 10 per cent, plus or minus, of their percentage forecasts. Of the remaining 20, 7 departed from their forecasts by more than 10 per cent, 8 departed therefrom by more than 25 per cent, and 5 by more than 50 per cent.

As the depression became more acute in the years before 1933, the volume of glass container sales decreased (GCA Exhibit 5189, R. V. 3569, 14,867) and the pressure of overcapacity thus became more severe. In the code which was approved on October 3, 1933 (R. V. 3568), an effort was made to convert the principle of voluntarily sharing the available business by uncoerced individual action into a sharing of the business pursuant to an enforceable agreement. Schedule A of the Code for the glass container industry (GCA Exhibit 5189, R. V. 3569, 14,867) provided in effect that, so long as the industry rate of operation to capacity was less than 70 per cent, a system of allocating the available business should be enforced. The Code Authority was to formulate a plan therefor which,

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[1] As has been pointed out in more detail below, the disparity between the forecasts and actual performance during the period from 1935 to 1939 (from the invalidation of the NRA Code until the formal abandonment of the publication of percentage forecasts) was even wider.

[2] Although the Code became technically effective on October 3, 1933 (R. V. 3568), the Code Authority began to be active only in 1934 (R. V. 3571).

after approval by Government authority and subject to right of appeal by each member of the industry, was to be compulsory, and which would forbid an individual company from manufacturing a larger volume than was assigned to it (*ibid.*).

Thereupon the Code Authority made an elaborate statistical survey of the industry and tentatively assigned to each company a percentage of the total industry business, on the basis of its past shipments and present capacity (R. V. 3570). Individual hearings were held to consider each company's criticism of the percentage assigned to it (R. V. 3570); and, as a result of these hearings, certain revisions were made and a revised percentage was sent to each member, with the request that it agree to it. Only five or six assents were ever received by the Code Authority; the other companies still contended that their allocations were too low (R. V. 3571). While these hearings and readjustments were taking place, negotiations were being carried on with the Government authorities to secure their approval of the system, as required by Schedule A to the Code (GCA Exhibit 5189, R. V. 3569, 14,867). This approval, however, had not been given (R. V. 3571) when the *Schechter* case ended the NRA.

The experience of the Code period established the impossibility of securing any industry agreement that each company would abide by a percentage of the total industry volume assigned to it; for, during this period, when such an agreement was contemplated by the Code, it was found entirely impossible to persuade most of the companies to make it.

After the Code was invalidated in May 1935, the percentage forecasts which had been calculated by the Code Authority were mechanically reproduced, month by month (R. V. 3572), by the GCA on its statistical statements similar to Government's Exhibits 600-606, R. III. 1546-47, 13,211, without change save in the two instances described

in the footnote,[3] until July, 1939 (R. V. 3572). The purely mechanical and automatic quality of this repetition without change, of the percentage forecasts fixed by the Code Authority, is established by two circumstances:

(1) Government's Exhibits 1390-1485 (R. V. 3532) compare, for each year of the period 1935 to 1939, each company's percentage forecast with its actual percentage of industry shipments. These exhibits establish that during this period, no one paid any attention to the percentage forecasts. By 1939, of 27 companies reporting their general line shipments, only 5 companies shipped a volume which was within 10 per cent, plus or minus, of their forecast volume; 8 companies were between 10 and 25 per cent away from their forecast; 6 companies were between 25 and 50 per cent away; 3 companies were between 50 and 100 per cent away; and the remaining 5 companies were more than 100 per cent away. The individual variations went as high as 287 per cent. Even the Knox Company, whose reports the Government introduced as Exhibits 600 to 606, R. III. 1546-47, was producing, in 1939, a volume equal to 212 per cent of its forecast percentage, an excess of 112 per cent.

(2) Immediately above the percentage forecast appearing on the GCA statistical statements of which Government's Exhibits 600 to 606, R. III. 1546-47, 13,211, are typical, was an "industry forecast" which purported to express the volume which the industry would ship during

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[3] The only changes in forecasts from July of 1935 until the whole matter was dropped in July of 1939 were (1) 2/10th of one per cent, which the Code Authority had failed to distribute, was added in 1936 to the percentage of the Fairmount Glass Company (Government's Exhibits 1390-1485); and (2) in the fruit jar and jelly glass division, the Kerr Company, one of the four manufacturers of these products, ceased to report its statistics to the GCA in the year 1936, and the percentages of the remaining companies which reported (Ball, Owens and Hazel) were restated mathematically to take account of the omission of the Kerr figures (R. V. 3572).

the current year (see Appendix A, line 1, and Government's Exhibits 600-606). In 1935, the Code Authority, as required by Schedule A of the Code (GCA Exhibit 5189, R. V. 3569, 14,867) estimated the volume for the year 1935 in the general line at 30,236,760 gross (R. V. 3570, and see Government's Exhibit 600, Appendix A, line 1). That figure of 30,236,760 gross was also reproduced continuously, month by month, without change, until July, 1939 (R. V. 3572), and see Government's Exhibits 601-606 (R. III. 1546-47, 13,211), despite the fact that general line shipments had increased by 1939 to more than 43,000,000 gross (R. V. 3572), and see GCA Exhibit 5188 (R. 3569, 8542).

After July 1939, the system of forecasts theretofore in operation was completely and voluntarily abandoned under circumstances hereinafter described.

There is no dispute as to what the GCA actually did in its publication of statistical data and in the operation of its system of forecasts. That no moral sanctions were applied by way of enforcing the forecasts and that the members of the GCA did not regard them as morally binding is conclusively established by GCA Exhibits 6082 (R. IX. 6619, Appendix C) and 6083 (R. V. 6619, 16,242A), prepared and presented at the trial by Hall, formerly secretary and treasurer and now assistant business manager of the GCA (R. IX. 6619). Exhibit 6083 (R. V. 6619, 16,242A) shows that, during this entire period, the industry never operated at as high a ratio to active capacity as sixty per cent, and that in the year 1932 the ratio of operations to active capacity dropped below fifty per cent. If potential capacity (including active furnaces and furnaces that could be made active within a sixty day period) be taken into account, the operating ratio was correspondingly lower, and fell below forty per cent in 1932. These figures establish, from an economic standpoint, the GCA's concern with the problem of over-capacity,

and its effort, by the educational methods approved in the *Maple Flooring* case, to minimize its disturbing effect.

GCA Exhibits 6084 to 6092, inclusive (R. IX. 6619-26, 16,242A), set forth in understandable and comprehensive fashion, the actual volume of gross sold by each of the companies in the industry in each of the years 1928 to 1939, inclusive, and the relation of those volumes to the industry total. The charts, R. IX. 6423-26 (Exs. 6084, 6087, 6089, 6091, Appendices D, E, F, G), disclose the following situation:

(a) From 1928 to 1939 the industry's total sales of glass containers increased from 31,943,016 gross to 49,366,339 gross, or 154.55% (GCA Ex. 6083, R. IX. 6619, 16,242A).

(b) As a group, the small companies (defined as those which produced less than 200,000 gross in 1928) increased their sales from 2,140,935 gross in 1928 to 5,155,259 gross in 1939, or 240.79% (GCA Ex. 6086, R. IX. 6625, 16,242A). In 1939 all but three of the eighteen small companies had increased their business more than the industry average, by amounts ranging from 208.33% to 630.87%; only three, Kerr with 124.46%, Lamb with 112.57%, and Sterling with 112.45%, were below the industry average of 154.55% (GCA Exs. 6084-6, R. IX. 6624-26, 16,242A).

(c) As a group the medium-sized companies (defined as those which shipped from 200,000 to 1,000,000 gross in 1928) increased their sales from 4,386,284 gross in 1928 to 10,568,078 gross in 1939, or 240.93% (GCA Ex. 6088, R. IX. 6626, 16,242A). In 1939 all but one of the ten medium-sized companies were above the industry average, with percentages ranging from 160.96 to 483.60; only one, Maryland Glass Company, was below the industry average of 154.55%; and that by only about 10% (GCA Exs. 6087-8, R. IX. 6625, 16,242A).

(d) As a group the large companies (defined as those which shipped more than 1,000,000 gross in 1928 and in-

cluding Owens, Illinois, Hazel-Atlas, Anchor-Hocking, Thatcher, Ball Brothers and Armstrong Cork) increased their sales from 25,415,797 gross in 1928 to only 33,643,002 gross in 1939, or only 132.37% (GCA Ex. 6090, R. IX. 6626, 16,242A). In 1939 all but one of the six large companies failed to show as great an increase in volume as the industry average; only Ball Brothers, with 162.58% of 1928 volume, exceeded the industry average of 154.55% (GCA Exs. 6089-90, R. IX. 6626, 16,242A).

(e) Of the twenty-eight companies in the small and medium-sized group, all but four had a larger share of total industry sales in 1939 than they did in 1928, and their increases were not uniform, but varied from 160.96% to 630.87% (GCA Exs. 6084-8, 16,242A). While each of the remaining four companies in these groups sold a larger number of gross in 1939 than in 1928, the increase was in each case less than the industry average (GCA Exs. 6084-8, R. IX. 6624-26, 16,242A). Five out of the six large companies, on the other hand, had a smaller percentage of the market in 1939 than 1928; and the only one (Ball Brothers Company) which increased its share of the total business did so only slightly (GCA Exs. 6089-90, R. IX. 6626, 16,242A).

(f) Thus the relative position of the small and medium-sized companies immensely improved over the period in question. The average percentage increase in the volume of these groups was approximately 140% of the 1928 volume. The percentage increase in the volume of the large companies was approximately 132% of the 1928 volume. The *absolute* position of the small and medium-sized companies also immensely improved during this period, for together they secured more than one-half (52.8%) of the total increase in business between 1928 and 1939, while less than half of this increase (47.2%) went to the large companies. Thus from 1928 to 1939 the small and medium-

sized companies increased their percentage of total industry volume from 20.4% to 31.8% and the large companies suffered a corresponding decline (GCA Ex. 6092, R. IX. 6626, 16,242A).

In the light of this undisputed record evidence, how does the whole case stand on the issue of the percentage forecasts? We submit that this evidence, constituting the irrefutable and undisputable record of what actually occurred in the industry from the year 1928 to the year 1939, is not only consistent with our position but it demonstrates beyond the point of supportable contradiction that the judgment of the District Court is wholly unsound and without any basis whatsoever in the evidence.

The appellants primarily rely upon the history and purpose of the percentage forecasts given by Ackerman, who from 1928 to 1941 was assistant business manager of the GCA. He testified that these forecasts were intended to be and were nothing more than an educational effort (R. V. 3563); that there was no agreement on the part of any company to abide by them (R. V. 3565); and that there was no effort to enforce adherence thereto, whether by moral suasion or commercial pressure or otherwise (R. V. 3565). He also stated that the publication of the percentage forecasts proved wholly ineffectual (R. V. 3573), and that their futility led to their abandonment as soon as a question was raised about them (R. V. 3530). His testimony that the percentage forecasts involved no element either of agreement, coercion, or enforcement, is strongly corroborated, not only by the testimony of other defendants (Levis R. III. 2228, Rieman, R. III. 2061) but also by two non-defendant witnesses called by the Government (Underwood, R. III. 1548-49, Dugan, R. III. 2026), and by Hall (R. IX. 6641), who succeeded Ackerman as assistant business manager of the Association (R. IX. 6619). No witness testified to the contrary.

Ackerman's analysis of the percentage forecasts is further powerfully demonstrated by the statistical evidence of

Exhibits 6084-6092, R. IX. 6624, 16,242A. For had there been any agreement to observe these forecasts, or had they been enforced in any way, there would have been an inevitable and plainly discernible tendency for the volume of sales of individual companies to follow closely the volume of the industry as a whole. Had the forecasts been effectuated through agreement or coercion, inevitably the volume trends of the individual companies would have converged upon, instead of diverging from, the trend of the industry as a whole. The charts in evidence as GCA Exhibits 6084, 6087, 6089 and 6091, R. IX. 6624-26, 16,242A), however, dramatically demonstrate that this failed to happen in the slightest degree. While the volume of the industry as a whole increased 154% between 1928 and 1939, the increases in the volume of individual companies ranged all the way from 110% in the case of Anchor Hocking to 630% in the case of Gayner, with the others scattered at random in between. A glance at these charts conclusively proves that the educational system failed to work.

The Government, upon this phase of the case, depends upon the wholly unsubstantial basis of certain inferences it attempts to draw from a comparatively few isolated and sporadic letters written over a period of many years, not by the GCA nor in its behalf, but by individuals expressing nothing more than their own personal views or suggestions. These letters discuss in various connections the GCA's "quota," "allotment," or "forecast" system; and from them the Government seeks to infer that the authors, and therefore the industry as a whole, regarded the percentage forecasts as a binding allocation of production, enforceable, not by legal proceedings, but by "moral sanctions" or commercial pressure. However, the exhibits introduced through the witness Hall, and already noticed, demonstrate the unsoundness of these conclusions; and concerning these letters, two observations should be made:

1. All of them, with the possible exception of Government's Exhibits 809, 810 and 811, (R. III, 2059, 13,478-79-80) written by the witness Rieman, are just as consistent with our interpretation of the percentage forecasts as with the Government's. The Rieman exhibits may be thought to go somewhat further; but, as to them, it must be remembered that they were written, as Rieman testified (R. III. 2065), in July and October of 1935, just after the invalidation of the NRA Code for the glass container industry, which had provided for a compulsory system of allocations, and at a time when all industry was thinking, as was Rieman himself, in terms of the probability that an equivalent for the NRA Codes would be developed in some other way.

2. Of the twelve authors of these Exhibits, two (Knox Smith and Kimball) are dead and two (King and H. C. Mandeville) were not called to the witness stand. All the others testified either (1) that the forecasts had never been regarded as binding or enforceable allocations (Dugan, R. III. 2026; Rieman, R. III. 2061; Levis, R. II. 2228; Hall R. IX. 6641) or (2) that they knew of no effort by the GCA to impose production limitations by a system of quotas (F. G. Smith, R. II. 1285; Eldred, R. V. 3397) or (3) they were not interrogated by counsel for the Government as to their understanding of the GCA's percentage forecasts (Hartley, Carter).

The Government contends, and the District Court found (Finding of Fact 503, R. X. 7377, opinion of court below, (Opinion 92, 93) that the percentage forecasts were regarded as morally binding, but there is no evidence to that effect. If this had been true, the volume of the sales of individual companies would have tended to rise or fall in proportion to the rise or fall of total industry volume, for, if each company maintained a fixed percentage of the total, the variations in its volume would be the same as the variations of the total. But the evidence demonstrates beyond question that this was not the case, and that the

volume of sales of the large majority of the companies diverged widely from the industry average.

The Government also contends and the District Court found (Finding No. 501, R. X. 7376) that the percentage forecasts, coupled with the voluntary exchange of data among the representatives of various companies which, until July, 1939, took place at meetings of the Statistical Committee, afforded a means whereby the large companies whose representatives comprised the Statistical Committee could and did apply moral sanctions to hold their smaller competitors in line. But, again, if this had been true, the volume of the sales of the small and medium-sized companies would have tended to remain at or below the average for the industry; and, again, the evidence proves that the reverse actually happened. The record as a whole establishes that the sole purpose of the forecasts was to ameliorate the devastating effect of the industry's great over-capacity by providing the information upon which to base individual action, without agreement, concert or coercion of any kind.

We believe it is clearly established by the decisions of this Court that the publication of percentage forecasts by the GCA, in the circumstances above described, was not illegal. The cases establish that where, as here, there is no agreement, understanding, nor concerted action to fix or affect prices or to limit or restrict production, the incidental effect, on an individual company's price or production policy, of more complete, detailed and scientific information about the industry is not illegal, and that a system which disseminates statistics and creates a more informed knowledge of industry conditions does not contravene the Sherman Act. Thus, in *Maple Flooring Association v. United States, supra,* Mr. Justice Stone, speaking for the court, said at page 582:

> "It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or busi-

ness and to produce uniformity of price and trade practice. * * * But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce, and its consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce or if so it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful.

"It is the consensus of opinion of economists and of many of the most important agencies of Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. * * * General knowledge that there is an accumulation or surplus of any market commodity would undoubtedly tend to diminish production, but the dissemination of that information cannot in itself be said to be restraint upon commerce in any legal sense. The manufacturer is free to produce, but prudence and business foresight based on that knowledge influence free choice in favor of more limited production * * *. Restraint upon free competition begins when improper use is made of that information through any concerted action which operates to restrain the freedom of action of those who buy and sell." (pp. 582, 583.)

In *Cement Manufacturers Protective Association v. United States,* 268 U. S. 588, this Court again speaking by Mr. Justice Stone said:

"We realize also that uniformity of price may be the result of agreement or understanding, and that an artificial price level not related to the supply and demand of a given commodity may be evidence from which such agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred. *But here the Government does not rely upon agreement or understanding, and this*

*record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred; and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action.**

For reasons stated in *Maple Flooring Association v. United States, supra,* such activities are not in themselves unlawful restraints upon commerce and are not prohibited by the Sherman Act." (p. 606)

This principle was reaffirmed in *Appalachian Coals, Inc. v. United States,* 288 U. S. 344, at 374 (1933), where the court said, citing the *Maple Flooring* and *Cement Manufacturers Association* cases:

"The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the cooperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result."

Similarly, in *Sugar Institute, Inc. v. United States,* 297 U. S. 553, at 598 (1936), the court said:

"Further the dissemination of information is normally an aid to commerce. As free competition means a free and open market among both buyers and sellers, competition does not become less free merely because of the distribution of knowledge of the essential factors entering into commercial transactions. The natural effect of the acquisition of the wider and more scientific knowledge of business conditions on the minds of those engaged in commerce, and the consequent stabilizing of production and price, cannot be said to be an unreasonable restraint or in any respect unlawful."

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* Emphasis in this brief is our own.

What the defendants here did is squarely within the permission of the foregoing statements by this Court of the principles which must govern the conduct of statistical systems by trade associations. The theory of the "percentage forecasts" and the principle of "live and let live" was that the effect, if any, which would flow therefrom, would be "the natural effect of the acquisition of wider and more scientific knowledge of business conditions on the minds of individuals engaged in commerce," and would be the influence of "prudence and business foresight (upon) free choice." *Maple Flooring Association v. United States, supra*; *Sugar Institute, Inc. v. United States, supra.*

Needless to say, none of the holdings in the foregoing cases, or, for that matter, in any of the prior decisions of this Court, casts any doubt upon the propriety of the system of percentage forecasts herein described. The *Maple Flooring* case approved a statistical system considerably more elaborate than that maintained by the GCA, in the absence, as here, of any evidence of agreement or concerted action regarding prices or production. *Appalachian Coals, Inc. v. United States* went somewhat farther and approved an arrangement whereby producers of more than 70 per cent of the coal in the important Appalachian area agreed to market their coal through a common selling agency, thereby eliminating all price competition among themselves, since it appeared that the coal from that area would be in substantial competition with the coal from other areas and with other fuels, that the combination would not have the power to fix prices, and that the sole effect of the combination upon them would be to stabilize them somewhat by removing the depressing effect of certain bad trade practices. *Sugar Institute, Inc. v. United States* approved an understanding that price changes would be announced through the industry's trade association, and struck down only the agreement that prices would not be changed without public announcement in this way. The

prior trade association cases (*Eastern States Lumber Association v. United States*, 234 U. S. 600 (1914), *American Column Co. v. United States*, 257 U. S. 377 (1921), and *United States v. American Linseed Oil Co.*, 262 U. S. 371 (1923)) had condemned the trade associations there involved only because of the presence of a finding of an agreement, formal or informal, that prices would be raised or that production or sales would be restricted. Prior to 1939, therefore, there was no suggestion in the cases that a statistical system which affected the prices or the production of members of the industry only through the operation of the voluntary choice of each individual member thereof regarding his company's policy, untrammeled by any agreement or understanding, was in violation of the Sherman Act; in fact, the *Maple Flooring, Appalachian Coals,* and *Sugar Institute* cases strongly indicated that a system having only that effect was legally unobjectionable.

In 1939 and 1940, this Court decided two cases of importance—*Interstate Circuit, Inc., et al. v. United States*, 306 U. S. 208 (Feb. 1939), and *United States v. Socony Vacuum Oil Co., et al.*, 310 U. S. 150 (May 1940). The *Interstate* case involved the simultaneous imposition by motion picture distributors upon their exhibitors in the Texas area, at the request of certain of these exhibitors, of the requirement that films distributed to so-called "A" or first run theatres be never shown subsequently as part of a double feature program, or for an admission charge of less than 25¢. The lower court found that this restriction was imposed by agreement between the distributors and some of the exhibitors. This Court affirmed this finding upon the evidence, but held that such agreement "was not a prerequisite to an unlawful conspiracy," saying at pages 226 and 227:

> "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were

> asked to participate; each knew that cooperation was essential to the successful operation of the plan * * *. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequences of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

In *United States v. Socony Vacuum Oil Co.*, the Court condemned a concerted program of oil producers and refiners to buy and remove from the market surplus or distress gasoline, even in the absence of any agreement that a particular price of gasoline be fixed or maintained, and even though the sole effect on the gasoline price structure was the result of the removal of a competitive evil.

Neither the *Interstate* nor the *Socony Vacuum* case is applicable here. The *Interstate* case depended (on the assumption that no agreement was necessary) upon the defendants' unanimous acceptance of the proposed plan of restricting the distribution of first run films. In the present case, as all the evidence shows, there was no unanimous nor even substantial acceptance of the principle implicit in the percentage forecasts. In the *Socony Vacuum* case, the program of buying distress gasoline which the Government challenged was admittedly the product of concerted action intended to affect price levels by removing a competitive abuse, whereas, in this case, all the evidence shows that there was no concerted action.

In the District Court the Government relied upon *American Column & Lumber Co. v. United States*, 257 U. S. 377, and to a less extent upon *United States v. American Linseed Oil Co.*, 262 U. S. 371, and contended that a system of production limitation enforced, not through an outright agreement nor understanding, but by moral sanctions is illegal, and that the GCA's was such a system, and must fall under the same ban.

We have no quarrel with the statement that a system of production limitation enforced by moral sanctions vio-

lates the Sherman Act; but the only way in which it can be suggested that there is a similarity between our situation and the *American Column & Lumber* or the *American Linseed Oil* cases is by failing to consider the trade association plans which were before the court in those cases. When this is done, it appears that the controlling difference between those cases and the case at bar is that the provisions of those plans which led the court to conclude that they were enforced by moral sanctions are precisely those which are absent from the present situation; and that our plan if it worked at all, which it did not, could do so only through its appeal to the individual intelligence of a manufacturer, by providing him with the "wider and more scientific knowledge of business conditions" and the "better understanding of economic laws" specifically approved in the *Maple Flooring* case.

Thus, in *American Column & Lumber Co. v. United States,* the plan provided as follows (257 U. S. 377, at 394-396): Each member was required to make six reports to the secretary, including:

> "1. A daily report of all sales actually made, with the name and address of the purchaser, the kind, grade and quality of lumber sold and all special agreements of every kind, verbal or written, with respect thereto. 'These reports are to be exact copies of orders taken.'
>
> "2. A daily shipping report, with exact copies of the invoices, all special agreements as to terms, grade, etc. The classification shall be the same as with sales.
>
> "3. A monthly production report, showing the production of the member reporting during the previous month, with the grades and thickness classified as prescribed in the 'Plan.'
>
> "4. A monthly stock report by each member, showing the stock on hand on the first day of the month, sold and unsold, green and dry, with the total of each kind, grade and thickness.
>
> "5. Price-lists. Members must file at the beginning of each month price-lists showing prices f.o.b.

shipping point, which shall be stated. New prices must be filed with the association as soon as made.

"6. Inspection reports. These reports are to be made to the association by a service of its own, established for the purpose of checking up grades of the various members and the 'Plan' provides for a chief inspector and sufficient assistants to inspect the stocks of all members from time to time."

Of this system of reports the court said at 395:

"Plainly it would be very difficult to devise a more minute disclosure of everything connected with one's business than is here provided * * * and very certainly only the most attractive prospect could induce any man to make it to his rivals and competitors."

In contrast, the GCA received from its members only monthly reports of total sales, total production, and total stocks on hand, showing no prices, no individual transactions, and no names of purchasers.

The American Column & Lumber plan further provided that, from the information so received, the secretary was required to send to each member the following reports (p. 396):

"1. A monthly summary showing the production of each member for the previous month, 'subdivided as to grade, kind, thickness,' etc.

"2. A weekly report, not later than Saturday, of all sales, to and including the preceding Tuesday, giving each sale and the price, and the name of the purchaser.

"3. On Tuesday of each week the secretary must send to each member a report of each shipment by each member, complete up to the evening of the preceding Thursday.

"4. He must send a monthly report, showing the individual stock on hand of each member and a summary of all stocks, green and dry, sold and unsold. This report is very aptly referred to by the managing statistician as a monthly inventory of the stock of each member.

"5. Not later than the 10th of each month the secretary shall send a summary of the price-list furnished by members, showing the prices asked by each, and any changes made therein must be immediately transmitted to all the members.

"6. A market report letter shall be sent to each member of the association (whether participating in the 'Plan' or not) pointing out changes in conditions both in producing and consuming sections, giving a comparison of production and sales and in general an analysis of the market conditions."

This meant, as the court pointed out, that every member of that association could determine, from the reports that he received, not only the total sales, or total production, or total stocks on hand of any other individual member, but each separate transaction which that individual member had engaged in, including the purchaser, the price and terms of sale, and the quantity and quality of the commodity. In contrast the GCA, except with the consent of the member involved, made no report to one member about the activities of another; and even such voluntary exchange of information as took place between members resulted, not in an intimate, detailed knowledge of individual transactions but merely of monthly totals.

In addition to the above described reports of past transactions, the American Column & Lumber plan provided, unlike that of GCA, for statements by each member, which the secretary would consolidate in his market report letters (1) estimating individual production for the next two months, (2) stating whether the individual plant would be shut down within the next few months for any reason, and (3) estimating market conditions for the next few months.

On the basis of all this, the Court held at page 399 that this plan went much further than a mere report of past transactions, however detailed, and that

> "It is plain that the only element lacking in this scheme to make it a familiar type of the competition suppressing organization is a definite agreement as to production and prices. But this is supplied: by the disposition of men 'to follow their most intelligent competitors,' especially when powerful; by the inherent disposition to make all the money possible, joined with the steady cultivation of the value of 'harmony' of action; and by the system of reports which makes the discovery of price reductions inevitable and immediate. The sanctions of the plan obviously are, financial interest, intimate personal contact, and business honor, all operating under the restraint of exposure of what would be deemed bad faith and of trade punishment by powerful rivals."

The facts in the *American Linseed Oil* case do not differ, in their important aspects, from those in the *American Column & Lumber* decision. The Linseed Oil plan required the subscriber, among other things, (1) to file with the central bureau each price list immediately upon issuance; (2) to report by telegraph all offers deviating therefrom; (3) to report daily the price, terms and quantities of each sale, and the type of customer to which it was made; and (4) on request by any other member, to report whether he had made either a quotation or an actual sale to a particular account. This information was relayed by the central bureau to each other member. The court therefore held that such a plan "which took away their freedom of action by requiring each to reveal to all the intimate details of its affairs" ~~(Italics supplied)~~ was illegal, on the authority of the *American Column* case.

The controlling differences between the plans held illegal in the foregoing cases and that followed by the GCA are these:

> (1) There each member reported daily all the details of every sale he made, including price, terms, quantity, and either identity or classification of customer. Here each member reported monthly only total

quantities of goods shipped, produced and on hand, with no statement as to prices, dollar values, or individual transactions.

(2) There the plans provided for the automatic transmission, not less frequently than every week, to every member, of the detailed statement of all the transactions of every other member. Here the plan provided for a statement to each member only of the lump sum totals shipped, produced, and held monthly by all the members together; he could secure information regarding another member's activity only if that other member wanted to give it to him, and then all that he got was a statement of monthly sales, production, stocks on hand, and a percentage forecast.

(3) There the records were apparently silent on the question whether, in fact, sanctions were applied to prevent deviations from price lists or suggested production or sales programs; and the court in each case clearly inferred from the nature of the statistical system that such pressure was intended to be and was in fact applied. Here the testimony is unanimous that no such pressure was in fact applied.

In short, the detailed nature of the reports made in the *American Column* and *Linseed Oil* cases, both by the members to the bureau and by the bureau to the members, made it likely that "moral sanctions" would be applied, and the court inferred that in fact this had been done. Here not only was the individual information reported by each member to the GCA infinitely less detailed—so much so as not to raise, but rather to rebut, any inference of ulterior motive—but there was no way in which any other member, large or small, could have access to it without the specific consent of the member in question. It follows that those systems might be regarded as calculated to provide for "moral sanctions," while this system is calculated to avoid and has in fact avoided their application.

We therefore submit that the statistical system, even as maintained by the GCA prior to the abandonment of the publication of percentage forecasts in July of 1939, was not in violation of the anti-trust laws.

POINT THREE.

UPON THE UNCONTROVERTED EVIDENCE, THE GCA, IF IT EVER HAD IMPROPERLY RESTRICTED THE PRODUCTION AND DISTRIBUTION OF GLASS CONTAINERS BY A SYSTEM OF FORECASTS, HAD COMPLETELY AND VOLUNTARILY ABANDONED THE PRACTICE BEFORE THIS SUIT WAS COMMENCED.

The uncontroverted evidence establishes the following with relation to the abandonment by the GCA of its system of forecasts which the District Court found to be objectionable:

(1) The idea of percentage forecasts was originated late in the year 1928 to help meet the problem of the glass industry's great overcapacity (R. V. 3529).

(2) The NRA Code for the glass container industry made provision for a compulsory system of quotas or allotments (GCA Ex. 5189, R. V. 3569, 14,867), which was never put into effect, partly because the vast majority of companies could not reach an agreement on the share of the total business to be allotted to each (R. V. 3571).

(3) For a period of several months after the NRA was declared unconstitutional on May 25, 1935, there was widespread discussion of possible substitutes for the invalidated codes; but nothing came of it (R. V. 3575).

(4) From the time when the glass container code was upset in 1935, the sole activity of the GCA with respect to the percentage forecast system was to publish, without change, on the statistical statement sent out to each company, the percentage for that company calculated by the NRA Code Authority (R. V. 3572). This publication was continued mechanically until July, 1939, despite the fact, as appears from GCA Exhibits 6084-6092 (R. IX. 6620-26, 16,242A), described above, the actual performance of the individual companies came to have less and less relationship to the percentage so calculated (R. V. 3573).

(5) In July of 1939, before this action was instituted, when counsel for the Armstrong Cork Company, after a thorough examination of the GCA's affairs, raised a question concerning the continued publication of these percentages, the GCA immediately and wholly voluntarily and by the positive overt act of changing the form of the statistical reports so as to eliminate any valid objections thereto, abandoned the practice (R. V. 3530), as it had been considering doing for a period of a year (R. V. 3575); and abandoned at the same time any voluntary exchange of statistical data between individual members such as had previously taken place at committee or general meetings (R. V. 3579).

(6) Upon the discontinuance in 1939 of the percentage forecasts and the industry forecast theretofore used, the GCA staff recommended and the Statistical Committee authorized (R. V. 3530) the adoption of the present form of statistical statement which eliminates all reference to forecasts and confines itself to the actual past performance of the member company in question (R. V. 3575). The Armstrong Company thereupon withdrew its resignation (R. V. 3575). This change took place in July of 1939 (R. V. 3575), about six months before this suit was filed and before the GCA had any intimation that it would be filed. A sample of the type of report that has been used from July 1939 is in evidence as Government's Exhibit 607, R. III 1547 (Appendix B).

The District Court upon this phase of the case made the following finding of fact:

> "506. As a result in part, at least, of the resignation of Armstrong Cork Company, the Association, since July, 1939, has omitted from its monthly reports any 'forecast' figures and instead shows the total shipments of the industry for each of the preceding five years, the total shipments of the company to which the report is sent, and the percentage of the total which that company shipped during each of the five years.

> The reports since July, 1939, have also included the active capacity and actual shipments of the industry and of the companies receiving the report for the preceding month, for the calendar year to date, and for the preceding twelve months, as well as the percentage of production to capacity for the industry as a whole and for the company, receiving the report (see Ex. 607)." (Finding 506, R. X. 7377.)

The record discloses that the Armstrong Cork Company did not think the dissemination of the monthly reports or forecasts "might be illegal," but that the publication of the percentage figures "looked suspicious and might be incorrectly interpreted" (R. V. 3575).

It has been held that, at least where public rights, such as those conferred by the Sherman Act, are to be vindicated, the mere abandonment of a challenged practice is not enough where it comes either after suit is filed (*United States v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897)) or in anticipation of suit, or otherwise in circumstances where the court concludes that a resumption of the challenged practice is likely in the absence of an injunction. There is abundant authority, however, requiring the denial of an injunction in a case like the present where the record is clear that the challenged practice has gone for good.

The leading case is *United States v. United States Steel Corporation*, 251 U. S. 417 (1920), in which it was proved that, beginning in 1901 and continuing sporadically until 1911, a few months before the bill was filed (see 223 Fed. 55, at page 60), the so-called Gary Dinners were held, at which illegal price fixing took place. This Court affirmed the denial of an injunction by the lower court, saying at page 445:

> "(These dinners) after instances of success and failure, were abandoned nine months before this suit was brought. There is no evidence that the abandonment was in prophecy of or dread of suit; and the

> illegal practices have not been resumed, nor is there any evidence of an intention to resume them, and certainly no 'dangerous probability' of their resumption, the test for which *Swift & Co. v. United States,* 196 U. S. 375, 396, is cited. It is our conclusion, therefore, as it was that of the judges below, that the practices were abandoned from a conviction of their futility, from the operation of forces that were not understood or were underestimated, and the case is not peculiar. And we may say in passing that the Government cannot fear their resumption for it did not avail itself of the offer of the District Court to retain jurisdiction of the cause in order that if illegal acts should be attempted they could be restrained."

Here, practically all of the elements are present on which courts have relied in denying, and none on which they have relied in granting injunctions against challenged illegal practices discontinued before suit was filed. The percentage forecasts had been dormant for a number of years; prior to 1939 there had been no reason to suspect their legality, but they had been found to be futile; they were abandoned, on the advice of counsel, as soon as complaint was made about them; this took place before suit was filed and not in anticipation thereof; and the GCA does not have any intention to resume their publication. The case is therefore one to which may be applied the comment in *Maple Flooring Association v. United States, supra,* at page 577, that

> "We think it might be urged, on the basis of this record, that the defendants, by their course of conduct, instead of evidencing the purpose of persistent violators of law, had steadily indicated a purpose to keep within the boundaries of legality as rapidly as those boundaries were marked out by the decisions of courts interpreting the Sherman Act."

POINT FOUR.

THERE IS NO SUBSTANTIAL EVIDENCE THAT THE APPELLANTS, UNLAWFULLY AND IN FURTHERANCE OF THE CONSPIRACY CHARGED, IMPROPERLY AND UNDULY LIMITED THE EXPANSION OF THE GLASS INDUSTRY BY KEEPING NEWCOMERS FROM ENTERING THEREIN.

The Government, in support of its charges upon this phase of the case, with access to all of the records, correspondence, etc. of the GCA and to the files of the other defendants, was able to produce only a very few isolated letters written over a period of many years upon which it seeks to predicate inferences of very doubtful value. It rests its case in this respect wholly upon exchanges of correspondence between Pease of Hartford and Ackerman of the GCA (Government's Exhibits 476, R. II. 1314, 13,093 and 477, R. II. 1315, 13,094, 503, 504, R. II. 1331, 13,093 and 509, R. II. 1331, 13,120), upon certain other letters of Ackerman concerning, or in response to, inquiries about the situation of the glass container industry, including Government's Exhibits 478, R. II, 1315, 13,095, and 1376-79, R. V. 3480-3501, 13,953, and upon the testimony of Ackerman at pages R. V. 3480 to R. V. 3501 and R. V. 3501 to R. V. 3503.

In substance, Ackerman testified (R. V. 3482-89) that the general policy of the GCA was to give to everyone, whether he was already in the business or was contemplating entering it, "all of the facts and figures that we had relative to the industry, which we thought were necessary for them to consider in entering into a sizable investment for the glass container industry. We felt that that was our duty as the Glass Container Association * * * duty to the prospective investors and duty to our own people, to give them as complete information as we could on the industry"; that during this period the industry was operating at less than 60 per cent of capacity; that (R. V. 3497) the sole extent to which the GCA discouraged newcomers from entering the business was the presentation of facts and figures

relative to the industry; that (R. V. 3489) "facts and figures can only be presented as they are. I don't believe I lied about any figures in the industry. As long as I presented figures as they were reported to us, if they were discouraging figures, a discouraging picture, there was not anything I could do about it. That was it. It was the fact"; that (R. V. 3496) the GCA had no understanding with Hartford that it should discourage or prevent any firms from coming into the business; and that (R. V. 3562) his exchanges of correspondence with representatives of Hartford were brought about by the fact that Hartford had information different from or in addition to that possessed by the GCA which Ackerman desired to get in order to present a complete and accurate picture of the industry.

The Exhibits introduced by the Government on this subject support the testimony of Ackerman as above set forth. Government's Exhibit 478, R. II. 1315, 13,095 is a typical response by Ackerman to an inquiry by one Gause, of the Connelly Glass Company, of Caney, Kansas, dated January 9, 1933, which reviewed the situation in the glass container industry at that time, and closed with a plea for full investigation before any investment was made. We do not understand that the Government challenges the accuracy of any of the statements of fact which the letter contains. Government's Exhibits 1376 to 1379, R. V. 3488-3501, 13,953, are nothing more than answers such as Ackerman must have had to make to inquiries that came to him, in his capacity as information bureau for the industry, as to rumors concerning future construction of new plants either by new companies or those already in business. They have, so far as we can see, no further significance.

Government's Exhibits 476 (R. II. 1314, 13,093), 477 (R. II. 1315, 13,094), 503, 504 (R. II. 1331, 13,114C-D) and 509 (R. II. 1335, 13,120) comprise an exchange of correspondence between Ackerman and Pease, the first two letters dated in 1933 and the last three in 1937, concerning the GCA's policy in answering inquiries of persons not

then in the business who were desirous of buying or building glass factories. Government's Exhibit 476 (R. II. 1314, 13,093), dated January 14, 1933, is Pease's first inquiry on this subject. It states that Hartford had not theretofore known what attitude the GCA was accustomed to take in answering such inquiries; that Hartford believed, in the light of existing overcapacity in the industry, that additional plants were undesirable; and that it hoped that the GCA was taking the same position. It closed with the hope that Pease and Ackerman would have an opportunity to meet and discuss the question. Ackerman replied, by Government's Exhibit 477 (R. II. 1315, 13,094), that, in general, he concurred with Pease's analysis of the industry situation; that he had done a good deal of work during the past several years in an attempt to keep new plants out of the picture; that he would be glad to discuss the matter with Pease so that their stories might fit together; and that he enclosed a copy of a typical answer to an inquiry concerning a new plant (Government's Exhibit 478, R. II. 1315, 13,095), with a request for any additional information that might be included in a letter of this type. Government's Exhibits 503, 504 R. II. 1331, 13,114C-D and 509 R. II. 1335, 13,120 comprise inquiries concerning other companies or individuals that were discussing entering the business.

At page R. V. 3562, Ackerman testified that when he voiced the hope that "our stories may fit together," he was expressing his desire that his own information concerning the industry situation be checked for accuracy by that which Hartford possessed, and that he be given any additional information that Hartford had, because "I knew that Hartford must have much more complete information in certain directions than I was able to get."

The Government contended in the District Court that Hartford and Owens entered into a conspiracy to exclude newcomers from the industry at least as early as the date

of their 1924 agreement and intimated that it was this conspiracy in which the GCA joined. But if this is so, could we find Pease writing to Ackerman nine years after the conspiracy is alleged to have been formed, stating (Gov. Ex. 476, R. II. 1314, 13,093):

> "* * * we have never had, first-hand, exactly what your policy has been or is in connection with newcomers into the glass container field.
>
> "I am merely writing this letter as food for thought, and if you do not agree with our ideas or have any suggestions, we would be glad to receive them."

Certainly this is not the language of participants in a conspiracy of nine years standing.

Taken together, the testimony and Exhibits which we have discussed are far from proving any violation of the anti-trust laws. As the trade association for the glass container industry, the GCA was naturally the recipient of numerous requests for information concerning the industry from those contemplating buying or building plants. Many such requests were referred to the GCA by its members, including, among others, Hartford. It was Ackerman's duty, as information bureau for the industry, to answer such inquiries as fully and as frankly as he could. This is what he did; and the Government has nowhere challenged the accuracy or completeness of the information which he gave in response to such inquiries. Admittedly, especially during the period covered by the Exhibits which the Government has seen fit to introduce, the glass industry as a whole was operating at a ratio of only 50 to 60 per cent of its capacity. So critical was this situation that the Code approved for the industry in October, 1933, contained a provision requiring that all new capacity be registered with the Code Authority and the NRA Administrator (Government's Ex. 5189, R. V. 3569, 14,867). In such a situation, a mere statement of the facts was, of course, discouraging to the investment of new capital in the industry, and this was as far as Ackerman or the GCA ever went.

The District Court found that "in its efforts to keep out newcomers, the Association has occasionally attempted 'to color' the 'facts' in replies to persons seeking to enter the industry in such a way that 'they might be discouraged'," basing its finding upon a statement in the testimony of Ackerman (R. V. 3478). However, the record clearly discloses that all that the GCA through Ackerman did in this regard was to truthfully and accurately state the facts which were, as already explained, often of and by themselves such as to present the difficulties incident to entering the glass container field.

The exhibits on which the Government relies to establish the alleged discouragement of newcomers fall into two groups: Government's Exhibits 476, 477 (R. II. 1314-15, 13,093-94) and 1377 (R. V. 3488, 13,953), dated in 1933 and 1934, which indicate a definite conviction that at that time the glass container industry was overexpanded and needed no new capacity, and which expressed the hope that new capacity would not come into it; and Government's Exhibits 503, 504 (R. II. 1331, 13,114C-D), 509 and 510 (R. II. 1335, 13,120), all dated in 1936 or 1937, none of which stated or implied that at that time the capacity of the industry was too great or sought to discourage additions thereto.

This evidence must be viewed in the light of the information contained in GCA Exhibits 6082 and 6083 (R. IX. 6619-20, 16,242A) as to the capacity of the industry and the ratio of its operations to such capacity. These Exhibits establish that in 1933, at the time of the Pease-Ackerman correspondence so much emphasized by the Government, the industry had just concluded a year in which it operated at only 47.8% of its active capacity and at only 39.9% of its active plus potential capacity. So critical was this situation that a provision was inserted in the NRA Code for the industry (GCA Ex. 5189, R. V. 3569, p. 5, 14,867) which was construed as requiring that a permit be secured for the construction of new capacity

(R. III. 2671). As the operating ratio moved upward in subsequent years, the Government is driven to relying on tenuous and equivocal evidence to support its theory that the GCA continued to advance the theory that the capacity of the industry was too great; and, during the last five years, it is unable to point to even one instance in which it can allege that this was done.

By Finding of Fact No. 507 (R. X. 7377) the District Court found: "In January, 1930, Thatcher, Hartford, Owens, and Hazel-Atlas, acting with the aid of the Association, engaged in a united but unsuccessful attempt to discourage Knox from increasing its capacity to produce glass containers (Exs. 630, 1841, 1842, 907, 908)."

There is, however, no substantial evidence in support of this finding. The facts, as disclosed by the record, are as follows: In the issue of the Glass Budget of January 4, 1930, Underwood of the Knox Company, announced the construction of a new glass plant at Oil City, Pennsylvania, and also described his plan "to build ten units duplicating the unit which is to be located in Oil City." (R. V. 3498). The appearance of such an announcement in the industry magazine, at a time when as Carter of Owens said in the Exhibit 630 (R. V. 3498, 13,281), and as Ackerman repeatedly testified, the industry as a whole was operating at only two-thirds of its capacity, would naturally cause concerned comment by the members of the industry, which would, also naturally, be substantially simultaneous. Stripping the transaction of the mystery with which the Government sought in the District Court to surround it by describing it as "concerted effort" by "conspirators," what happened was this: On January 4, 1930, Underwood gave wide publicity to plans for a radical expansion of the Knox Company. Various people at once expressed concern, and mooted the question what, if anything, could be done about it. Ackerman also expressed concern and sought to call a meeting consisting of himself, Underwood of Knox, Levis of Owens, McNash of Hazel-Atlas, Mandeville of

Thatcher and Stevenson, to discuss the matter. This meeting was never held, because it was thought it would be futile (R. V. 3500). This, as Ackerman testified at page R. V. 3500, "killed any idea of a meeting. This is the last I can recall (of) any discussion on the subject." Underwood of Knox completed the organization of his plant at Oil City, as he testified at page R. II. 1510. The exhibits, and the testimony concerning them, show conclusively that there was no meeting of minds, except perhaps on the proposition that nothing could or should be done about it; in fact, nothing was done.

POINT FIVE.

THERE IS NO REASONABLE NOR SUPPORTABLE BASIS IN LAW NOR UPON THE EVIDENCE FOR THE JUDGMENT OF INJUNCTION OF THE DISTRICT COURT.

The District Court found that the appellants were parties to the conspiracy upon two grounds: that (1) they unlawfully restricted the production and distribution of certain types of glassware by means of the GCA system of forecasts; and (2) they unlawfully prevented the expansion of the glass industry by discouraging newcomers from entering therein; and it was upon the basis of these findings that the District Court entered its judgment of injunction against the appellants. We respectfully submit that the judgment is, for the reasons already discussed, not supported by substantial evidence and is contrary to law, and, in any event, that there is no showing in the record that at the time judgment was entered the appellants were violating or threatening to violate the law. On the contrary, the uncontroverted evidence is that they had voluntarily and completely abandoned any otherwise objectionable aspect of the forecasts before this action was filed and with no knowledge that it was contemplated, and that their last act, which could possibly be construed as discouraging newcomers from entering the glass industry, occurred in 1937, two years before this action was filed.

And there is no "dangerous probability" of any objectionable activities being resumed (*U. S. v. United States Steel Corporation, supra*).

POINT SIX.

THE INJUNCTION GRANTED BY THE DISTRICT COURT IS IN ANY EVENT UNREASONABLE AND UNNECESSARILY DRASTIC AND PUNITIVE IN ITS NATURE, AND IT IMPOSES ON THE FUTURE OPERATIONS OF THE GCA RESTRICTIONS AND LIMITATIONS CONTRARY TO LEGAL PRINCIPLES HERETOFORE ANNOUNCED BY THIS COURT IN GENERALLY SIMILAR CASES.

We respectfully submit upon this phase of the case that, regardless of whether the record supports the finding of the District Court that the appellants were parties to the conspiracy and therefore an injunction of some nature should have been granted, nevertheless its judgment is clearly unnecessary, is destructive and punitive in nature, and is opposed to legal principles announced by this Court in generally similar cases, hereinbefore discussed.

(1) The District Court directed the appellants to abolish the Statistical Committee of the GCA, to establish no substitute for it, and to amend its certificate of incorporation and by-laws to that end (Judgment, Par. 37, R. X. 7678-79).

This action is based upon findings that the activities of this Committee related to the collection and dissemination of statistics; that it functioned from 1931 to date, except from October 1933 to May 1935, and had among its members representatives of the principal defendant corporations (Finding of Fact 497, R. X. 7376); and that it was the practice from 1931 to 1939 for members of the Committee to reveal their "quotas" or "forecasts" to one another (Finding of Fact 500, R. X. 7376).

The District Court in its opinion proceeds upon the theory that this Committee has been "a source of great evil in the assistance and cooperation" it has afforded certain

defendants in this action in their efforts to "stabilize the industry," and has been a "breeding ground" for "hatching" many of the conspiracies incidental to carrying out the general conspiracy. There is no evidence, however, that there was ever any conspiracy, general or incidental, "hatched" or otherwise conceived at any meeting of this Committee; all that the record discloses in this respect is that representatives of some of the defendant corporations, when attending a meeting of the GCA or one of its committees, or perhaps a GCA convention, sometimes got together and informally discussed various phases of industry business, but they did not do this at the GCA meetings or as a part of its business or as its officers and directors. There is no evidence that the Committee had anything whatever to do with the patent phase of the case; and in July, 1939, it approved the discontinuance of the form of GCA forecasts which has been found objectionable by the District Court and substituted therefor a form to which no valid objection can be made (R. V. 3530).

While the functions of this Committee are not clearly disclosed by the evidence it appears to have dealt with statistics, a subject with which the GCA had a conceded right to deal and, upon the evidence, did deal in many respects wholly lawful and free from criticism. The District Court in its opinion approved the future operations of the statistical activities of the GCA when it said:

> "The court believes it best that it (the GCA) shall continue merely as a statistical and research body and shall not go afield in an effort to dictate to the industry or be used for that purpose." (Opinion, 167, 168.)

How can the GCA continue as a "statistical body" without some committee or agency to deal with statistics? And why abolish completely the present committee and create no new committee with similar functions, and go to the wholly unnecessary extent of amending the certificate of incorporation and the by-laws of the GCA to that end?

We respectfully submit that in no reasonable view of the evidence and the law is it necessary or expedient to take the drastic action with respect to this Committee required by the District Court, and that any future violations of the law by it or its members can be sufficiently prevented and eliminated by a decree which peremptorily and perpetually enjoins any further participation in acts found to have been in furtherance of the conspiracy and in violation of the law, and leaves the GCA free to continue the Committee in the future as a constructive agency performing a valuable and necessary service to the GCA and the industry.

(2) The most punitive and destructive provisions in the decree of the District Court are those found in paragraphs 38 and 39 thereof, by which the GCA is enjoined from continuing in office such of its present officers and Board of Directors who are defendants herein or who are directors, officers or employees of any defendant corporation, and by which "it is directed to submit, on notice to the Attorney General, the names of such officers and directors as may be elected or appointed to succeed such (former) officers and directors to this Court for its approval prior to their taking office"; and by which the GCA is further enjoined from hereafter electing, employing or continuing in office or in its employ any person who is at the same time either an officer, director, agent or employee of certain of the corporate defendants herein, and is directed to so amend its certificate of incorporation and by-laws as to exclude from office or employment persons connected, in the manner indicated, with such corporate defendants.

Is there any possible necessity or justification for this order?

Concededly, the glass industry has a right to a trade association which, in turn, may, for the benefit of its members, and the industry, carry on its business in many aspects and for many purposes disclosed by the evidence and

concededly lawful and wholly unconnected with any conduct found to have been objectionable. How can the GCA as the trade association of the glass industry do so constructively and successfully and be of any real value, if the principal corporate defendants, constituting about 74 per cent of the productive capacity of the industry (R. V. 3574), can have no voice in its operational affairs?

The District Court in its opinion stated that it did not "believe that dissolution (of the GCA) is necessary" and that it should continue "merely as a statistical and research body" (Opinion, 167), and then proceeded by its judgment to practically destroy its value as an agency representing the glass industry. We believe further discussion upon this subject is unnecessary, and respectfully submit that these provisions should be eliminated from the decree of the District Court.

By sub-paragraph (1) (a) of paragraph 40 the future operations of the GCA, if it was a party to the conspiracy and has violated the law, are, we believe, sufficiently curtailed and regulated. By this provision, the GCA and the individual appellants are restrained from

> "agreeing, combining, or conspiring with any other defendant corporation, its directors, officers, agents, and employees, or with any other manufacturer or seller of glassware or of machinery to be used in the manufacture of glassware, its directors, officers, agents, and employees: (a) to limit the production of glassware or of machinery used in the manufacture of glassware, or to fix, raise, maintain, or adhere to prices of glassware or of such machinery; or to coerce, intentionally persuade, cause, impel, advise or induce any manufacturer of glassware or of such machinery to limit the production of glassware or of such machinery or to fix, raise, maintain or adhere to prices of glassware or of such machinery."

(The appellants should not be subject, however, to that portion of the decree above set forth (and contained in

other sub-paragraphs of paragraph 40) which relates to prices, because the District Court did not find that they were parties to any conspiracy relating to prices; nor should there be anything in the decree, insofar as it applies to the appellants, relating to glassmaking machinery because the GCA had nothing to do with machinery or with statistics relating thereto.)

We now call the Court's attention to other sub-paragraphs of paragraph 40 which we believe, for the reasons stated, to be clearly objectionable, not applicable to the facts or issues in this case, and in conflict with legal principles established by this Court in trade association cases heretofore decided.

By sub-paragraph (1) (b) the appellants are enjoined from agreeing, etc.

> "to ascertain the volume of business of manufacturers of glassware or of machinery used in the manufacture of glassware for any period or periods, or to make forecasts of the estimated demands for different types of glassware or of such machinery, where the purpose or effect thereof is to coerce or intentionally persuade any manufacturer of glassware or of such machinery to limit or control production or to fix, raise, or maintain the price of glassware or of such machinery."

If, as the form and punctuation of the first three lines of this sub-paragraph might be said to indicate, it is meant that the GCA cannot, under any conditions nor for any purpose, ascertain the volume of the business of the manufacturers of glassware, the prohibition is clearly too broad, because the mere ascertainment of this information, with no agreement that it shall be put to an improper use, is not unlawful. Many situations might arise in which the GCA, for wholly legitimate purposes, might desire to acquire and assemble such information. And, in this connection, *observe* that the forbidden ascertainment of the volume of business is not confined to that of

a single manufacturer, but would apply as well to any ascertainment of the over-all volume of the total manufacture in the industry.

That portion of this subparagraph which prohibits the GCA from making forecasts of the estimated demands for glassware, where the effect thereof is to persuade any manufacturer to limit or control its production, is objectionable because it enjoins the GCA from imparting information to the industry when the only effect thereof is to persuade a single manufacturer, acting of its own volition and relying upon its own uncontrolled judgment, to curtail or limit its own production and to do so in the absence of any agreement express or implied with other manufacturers in that regard. Such a limitation upon the operations of the GCA would in practice withhold from the industry trade information to which, under the decisions of this Court hereinbefore already noticed, it is entitled, and would require the members thereof to compete blindly and without adequate knowledge of the facts and thus make it impossible for the GCA as a trade association to fulfill a purpose heretofore deemed to be wholly lawful.

By sub-paragraph (1) (c) of paragraph 40 the appellants are restrained from agreeing, etc.

> "to collect, compile, analyze, or distribute data concerning the production, sales, orders, shipments, deliveries, costs, or prices of glassware or of machinery used in the manufacture of glassware, where there is any disclosure of data concerning any particular manufacturer or where the purpose or effect is to coerce or intentionally persuade any manufacturer * * *"

Here again, the prohibition is clearly too broad. The language used would prohibit the GCA from making a survey or analysis of the business of a single manufacturer, or, having done so, to impart the result thereof to such manufacturer alone. And, it is also open to the additional objection that it forbids, under any conditions and for any pur-

pose, any disclosure of statistics concerning the business of one manufacturer to other manufacturers—a practice which, in the absence of an agreement, express or implied, to prevent competition or otherwise violate the law, has been approved by this Court in some of its decisions heretofore cited and discussed.

By sub-paragraph (1) (d) of paragraph 40 the GCA and the individual appellants are restrained from agreeing, etc.

> "to distribute or report any statistics or statistical compilations concerning any aspect of the manufacture and sale of glassware or of machinery used in the manufacture of glassware, other than information bearing directly upon royalty payments owed to or paid to a licensor or dues owed to or paid to a trade association as provided in subdivision (e) of this subparagraph 40 (a), unless such information is made fully and fairly available to the general public at the time of its initial dissemination;"

Observe the far-reaching effect of the requirement that the *general public* be advised as to *any* statistics dealing with *any* aspect of the manufacture of glassware. This portion of the decree would make it impossible for the GCA to report to its members alone, or only to the glass industry the progress being made along any line of inquiry or research of a scientific nature. The record discloses that the glass industry as such competes with other industries (R. V. 3557); if this provision stands, the GCA must reveal to its competitors, as component parts of the general public, all that it does by way of research to improve its products and to protect and enhance its business.

The GCA could not lawfully distribute credit information without making it fairly available to the general public; nor could it make reports dealing with efficiency in the manufacture and distribution of glassware so that its members might avail themselves of improved methods and

thereby reduce costs. And there are obviously many other matters having to do with the production and distribution of glassware of such a confidential character that it should not be revealed to the general public. And here observe that it is the public as a whole that is to be kept advised and not only the "purchasing and distributing trade" (see decree in *Sugar Institute* case, *supra*).

In the *Sugar Institute* case, the decree of the trial court was modified by this Court in an aspect very similar to that under discussion here. There, the defendant was enjoined from disseminating statistical information regarding melt, sales, deliveries, etc. or any other statistical information of a similar character, unless such information was made readily, fully and fairly available to the purchasing and distributing trade. In determining that this provision was too broad in its scope and limiting the effect thereof, this Court used the following language, equally applicable here (297 U. S. 604):

> "This provision was based upoh the finding that 'Perfect competition and defendants' professed policy of fostering such competition require that the purchasing trade as well as the sellers have the full, detailed information which defendants withheld.' That ruling has appropriate reference to the statistical data which are specified in paragraph seven and to the withholding of which we have referred. In those data the purchasing and distributing trade have a legitimate interest. *But it does not follow that the purchasing and distributing trade have such an interest in every detail of information which may be received by the institute. Information may be received in relation to the affairs of refiners which may rightly be treated as having a confidential character and in which distributors and purchasers have no proper interest. To require, under the penalties of disobedience of the injunction, the dissemination of everything that the Institute may learn might well prejudice rather than serve the interests of fair competition and obstruct the useful and entirely lawful activities of the refiners.*"

By sub-paragraph (1) (e) of paragraph 40 the appellants are restrained from agreeing, etc.

> "to examine or audit the records or accounts of a manufacturer of glassware or of machinery to be used in the manufacture of glassware, provided, however, that this subparagraph 40 (1)(e) shall not * * * prohibit an association from having an independent auditor examine the records and accounts of members of the association where it is made a condition of the employment of such auditor that he disclose only such information to the association as is necessary to determine the amount of dues payable by the member to the association;"

This provision has no necessary nor direct relation to any issue in this case and is certainly not limited to acts in furtherance of the conspiracy, but seeks to regulate generally the right of the GCA to examine the accounts of its members. We respectfully submit that the decree should not be made the occasion for the exercise of such wholly extrinsic regulatory power.

By sub-paragraph (1) (f) of paragraph 40 the appellants are restrained from agreeing, etc.

> "to allocate or refrain from soliciting customers of manufacturers of glassware or of machinery used in the manufacture of glassware, or to allocate markets or marketing territories among the several manufacturers;"

This part of the decree should not be applicable to the appellants, for there is no evidence that they did anything in furtherance of the purposes stated.

By sub-paragraph (2) of paragraph 40, the appellants are restrained from

> "formulating, promoting or taking part in any plan with any other corporation for the prorating of business or the equitable sharing of available business."

The conduct forbidden herein is not even limited to that in furtherance of the conspiracy, but includes the formulating,

etc. of any plan, under any circumstances or conditions, for the prorating or equitable sharing of available business; and this provision is not even limited to a plan relating to the glass business or the glass industry.

And the prohibition is too broad in any event, in that it might be susceptible of a construction which would forbid members of the GCA, even in the absence of an agreement, combination or conspiracy, and acting solely as individuals and of their own free and uncontrolled choice, to take wholly independent action along the lines suggested.

By sub-paragraph (3) of paragraph 40, the appellants are restrained from

> "distributing data concerning the production, shipments, sales, orders, costs, or prices of any manufacturer of glassware or of machinery to be used in the manufacture of glassware, or presenting or discussing data dealing with sales, orders, costs or prices at meetings, or elsewhere, or by correspondence or otherwise, in such form or manner as to indicate that any manufacturer or manufacturers of glassware or of such machinery has or have exceeded any production quota or failed to adhere, or should conform to any price;"

If this part of the decree were limited to the distribution of data in furtherance of a conspiracy to maintain production quotas, it might not be objectionable, but it is so in its present form because: it is not limited to conduct in furtherance of the conspiracy; the language concerning prices and machinery should be eliminated for reasons already stated; and "discussing data dealing with sales" etc. in such form or manner as to "indicate" that any manufacturer has exceeded any production quota, is entirely too indefinite to be enforcible.

At the conclusion of paragraph 40, imposing upon the operations and activities of the GCA the limitations hereinbefore discussed, there is set forth the following proviso:

> "provided, however, that the provisions of this paragraph 40 shall not apply to agreements or discussions

> solely between officers, directors, or employees of the same corporation, nor shall this paragraph 40 prevent any single defendant corporation in the exercise of its own independent judgment from taking any action lawful under the Miller-Tydings Act."

There is nothing in this language that to any extent affects the arguments heretofore advanced in behalf of the appellants.

The issue in this case is whether or not the appellants were parties to the conspiracy; the District Court found they were in the two respects already noticed, i.e., restricting the expansion of the glass industry by preventing newcomers from entering therein and limiting production by means of the GCA's system of forecasts. If the appellants were parties to the conspiracy in these respects, the order of injunction against them, and the restrictions imposed upon the future operations of the GCA, should be limited to such restraining measures as may be necessary to prevent a continuation or a recurrence of acts in furtherance of the conspiracy. There can be no justifiable basis for making the decree in this case the occasion for regulating and restricting the future operations and activities of the GCA in respects wholly outside the issues here presented and thereby seriously impairing if not, for all practical purposes, destroying its value and utility as a trade association serving an important industry.

In this connection, we respectfully suggest that if the appellants have violated the law by participating in the conspiracy, the ends of justice will be sufficiently served by entering a decree herein such as was entered in the *Sugar Institute* and other cases previously decided by this Court, and which do not contain the punitive and destructive provisions hereinbefore discussed.

CONCLUSION.

We respectfully submit that, upon the law and the evidence, and for the reasons hereinbefore set forth, the judgment of the District Court as to the appellants should be reversed and a final judgment rendered in their favor; and that, in the event this Court does not render such a judgment, the judgment and decree of the District Court should be modified by the elimination therefrom of the various provisions which we believe, for the reasons stated, are unwarranted and objectionable.

Respectfully submitted,

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...se No. 4498 Civ.
...S. A. v Hartford et al
...OVERNMENT EXHIBIT
No. 609

APPENDIX A

COMPARATIVE STATISTICS

GENERAL LINE

		GROSS	AVG. WT. PER. GROSS	
INDUSTRY FORECAST 1935	$	30,236,760	86	1
YOUR FORECAST 1935		997,813	85	2
YOUR FORECAST %		3.30%		3

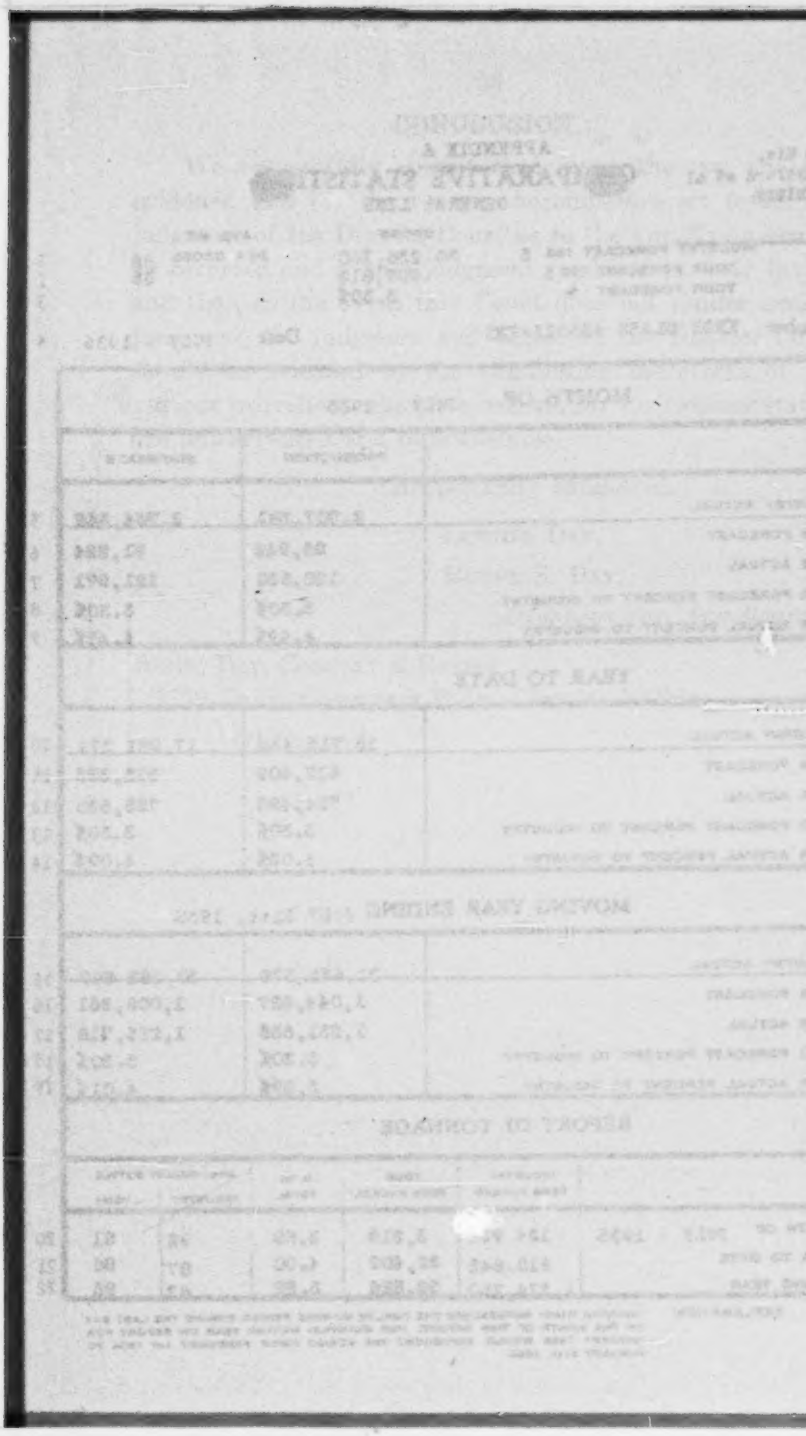
Member KNOX GLASS ASSOCIATES Date JULY - 1935 4

MONTH OF JULY - 1935	PRODUCTION	SHIPMENTS	
INDUSTRY ACTUAL	2,907,381	2,764,382	5
YOUR FORECAST	95,944	91,224	6
YOUR ACTUAL	128,530	121,971	7
YOUR FORECAST PERCENT TO INDUSTRY	3.30%	3.30%	8
YOUR ACTUAL PERCENT TO INDUSTRY	4.42%	4.41%	9
YEAR TO DATE			
INDUSTRY ACTUAL	18,715,436	17,981,371	10
YOUR FORECAST	617,609	593,385	11
YOUR ACTUAL	754,498	735,535	12
YOUR FORECAST PERCENT TO INDUSTRY	3.30%	3.30%	13
YOUR ACTUAL PERCENT TO INDUSTRY	4.03%	4.09%	14
MOVING YEAR ENDING JULY 31st, 1935			
INDUSTRY ACTUAL	31,638,376	30,583,860	15
YOUR FORECAST	1,044,627	1,009,261	16
YOUR ACTUAL	1,231,636	1,225,718	17
YOUR FORECAST PERCENT TO INDUSTRY	3.30%	3.30%	18
YOUR ACTUAL PERCENT TO INDUSTRY	3.89%	4.01%	19

REPORT OF TONNAGE

	INDUSTRY TONS PACKED	YOUR TONS PACKED	% TO TOTAL	AVG. WEIGHT BOTTLE INDUSTRY	AVG. WEIGHT BOTTLE YOUR	
MONTH OF JULY - 1935	134 295	5,218	3.89	92	81	20
YEAR TO DATE	810,845	32,402	4.00	87	86	21
MOVING YEAR	1,374,750	52,526	3.82	87	85	22

EXPLANATION: "MOVING YEAR" REPRESENTS THE TWELVE MONTHS PERIOD ENDING THE LAST DAY OF THE MONTH OF THIS REPORT. FOR EXAMPLE: MOVING YEAR ON REPORT FOR JANUARY 1935 WOULD REPRESENT THE PERIOD FROM FEBRUARY 1st 1934 TO JANUARY 31st, 1935.



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APPENDIX B

COMPARATIVE STATISTICS

EAST OF ROCKY MOUNTAINS

(ALL FIGURES IN GROSS OF BOTTLES UNLESS NOTED)

MEMBER KNOX GLASS ASSOCIATES, INC. GENERAL LINE DATE FEBRUARY-1941

HISTORICAL RECORD — ACTUAL SHIPMENTS

YEAR	INDUSTRY	YOUR COMPANY	% OF TOTAL
1936	39,280,128	1,743,704	4.40
1937	43,167,480	2,197,298	5.09
1938	37,901,180	2,553,047	6.74
1939	45,215,066	3,138,427	7.26
1940	46,283,800	3,366,745	7.28

CURRENT STATISTICS

MONTH OF FEBRUARY-1941	INDUSTRY	YOUR COMPANY	% OF TOTAL
ACTIVE CAPACITY	5,280,728	215,592	4.07
PRODUCTION	3,975,728	268,270	6.92
% PROD. TO CAPACITY	75.29%	124.43%	-
SHIPMENTS	3,949,809	331,740	8.62
% SHIP. TO CAPACITY	72.77%	153.87%	

YEAR TO DATE

ACTIVE CAPACITY	11,248,848	458,133	4.07
PRODUCTION	7,858,861	502,258	6.39
% PROD. TO CAPACITY	69.90%	109.63%	
SHIPMENTS	7,879,509	599,971	7.62
% SHIP. TO CAPACITY	67.48%	130.96%	

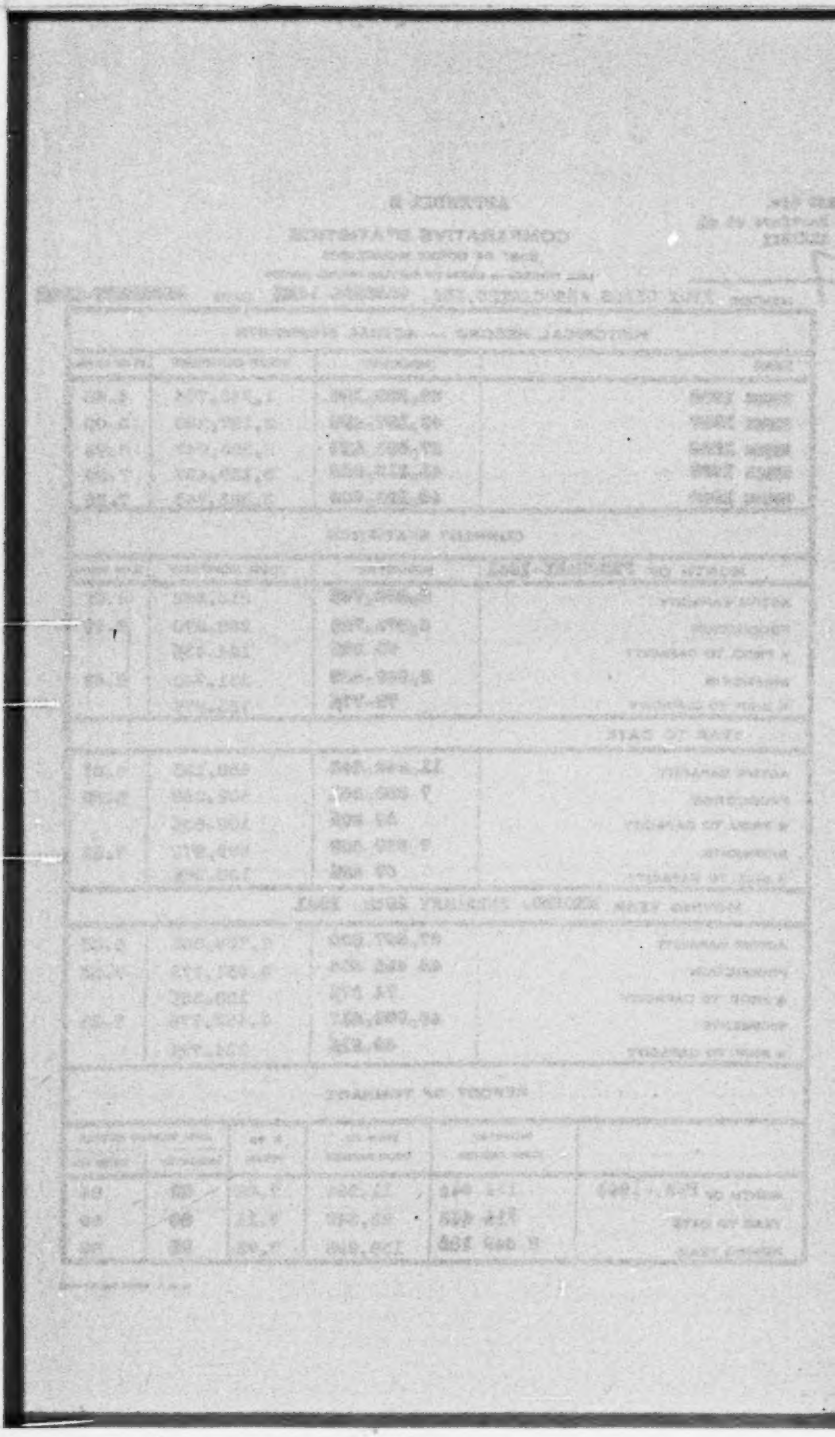
MOVING YEAR ENDING: FEBRUARY 28th, 1941

ACTIVE CAPACITY	57,897,820	2,766,858	4.07
PRODUCTION	48,455,305	3,551,176	7.33
% PROD. TO CAPACITY	71.37%	128.35%	
SHIPMENTS	46,992,817	3,452,776	7.35
% SHIP. TO CAPACITY	69.21%	124.79%	

REPORT OF TONNAGE

	INDUSTRY TONS PACKED	YOUR CO. TONS PACKED	% TO TOTAL	AVG. WEIGHT BOTTLE	
				INDUSTRY	YOUR CO.
MONTH OF FEB.-1941	154,944	11,286	7.28	89	84
YEAR TO DATE	314,445	22,349	7.11	89	89
MOVING YEAR	2,049,185	158,298	7.73	89	89

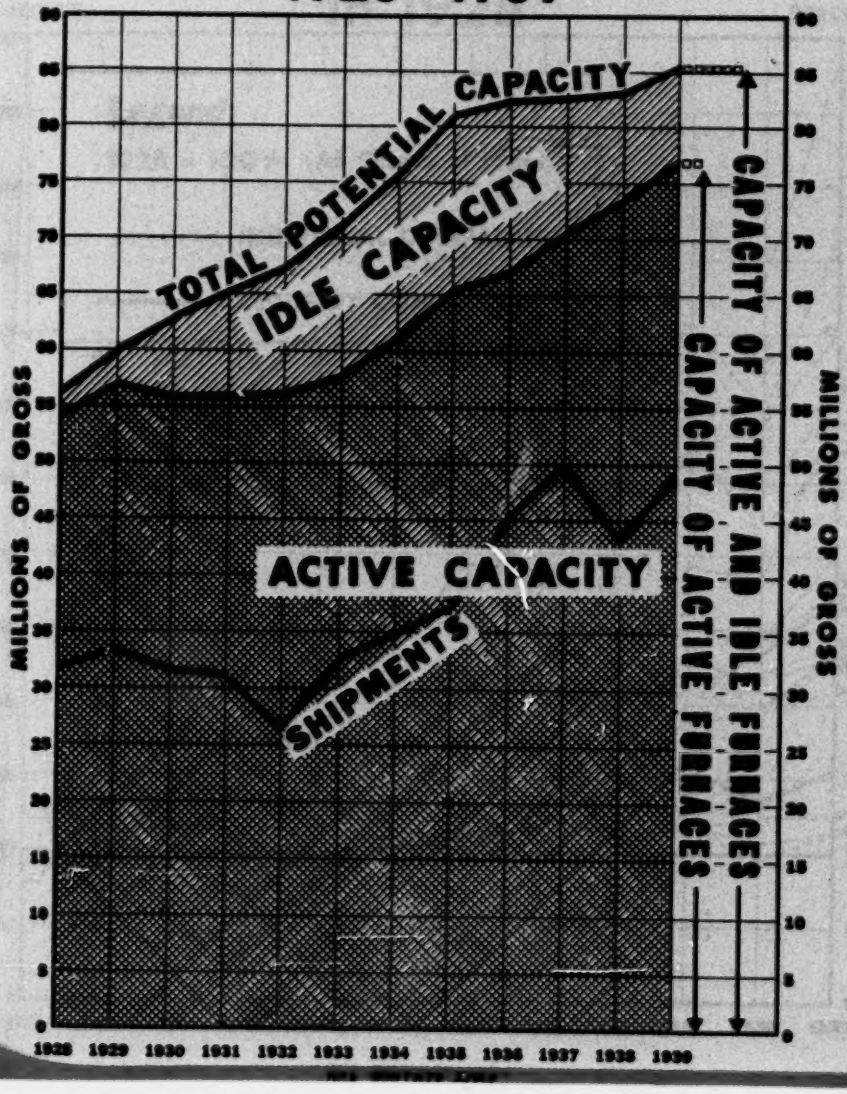
U. S. A. FORM NO. CG-G-42



APPENDIX C

GLASS CONTAINER INDUSTRY

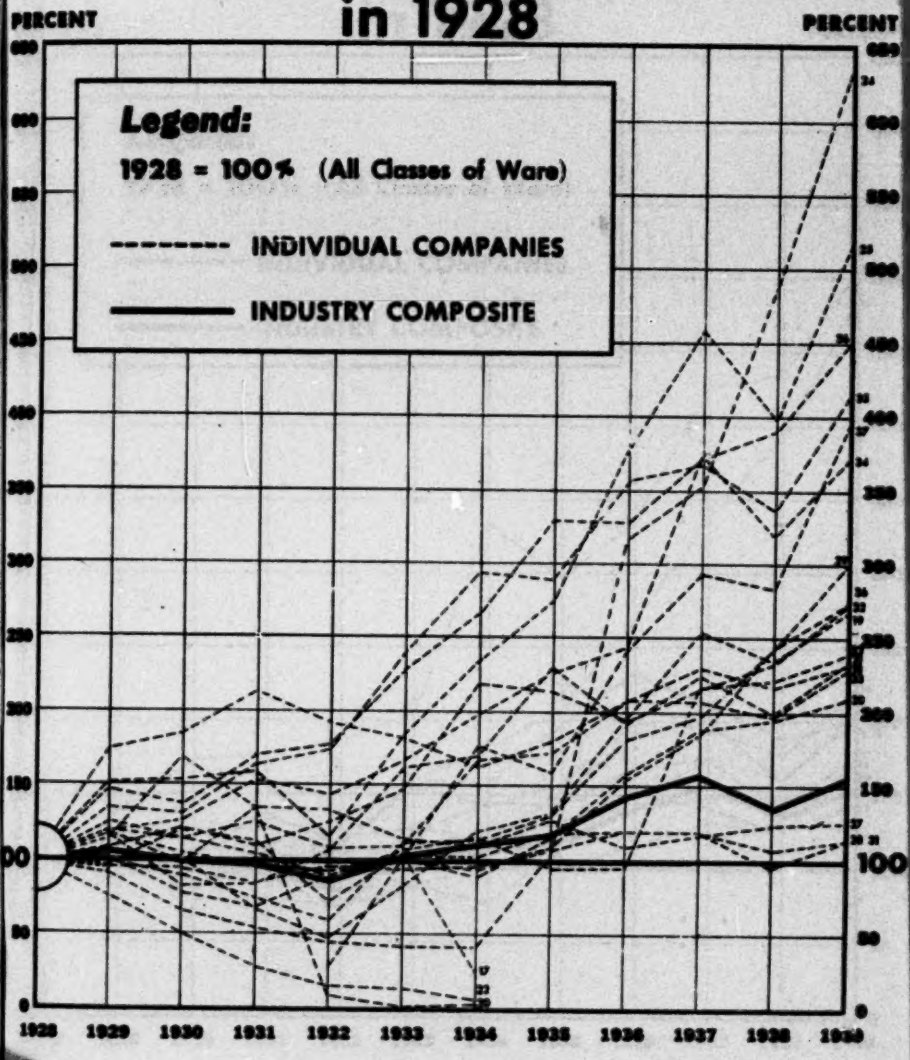
TOTAL SHIPMENTS Compared with CAPACITY 1928 - 1939



APPENDIX D

GLASS CONTAINER INDUSTRY

Progress of Companies Shipping Less than 200,000 Gross in 1928

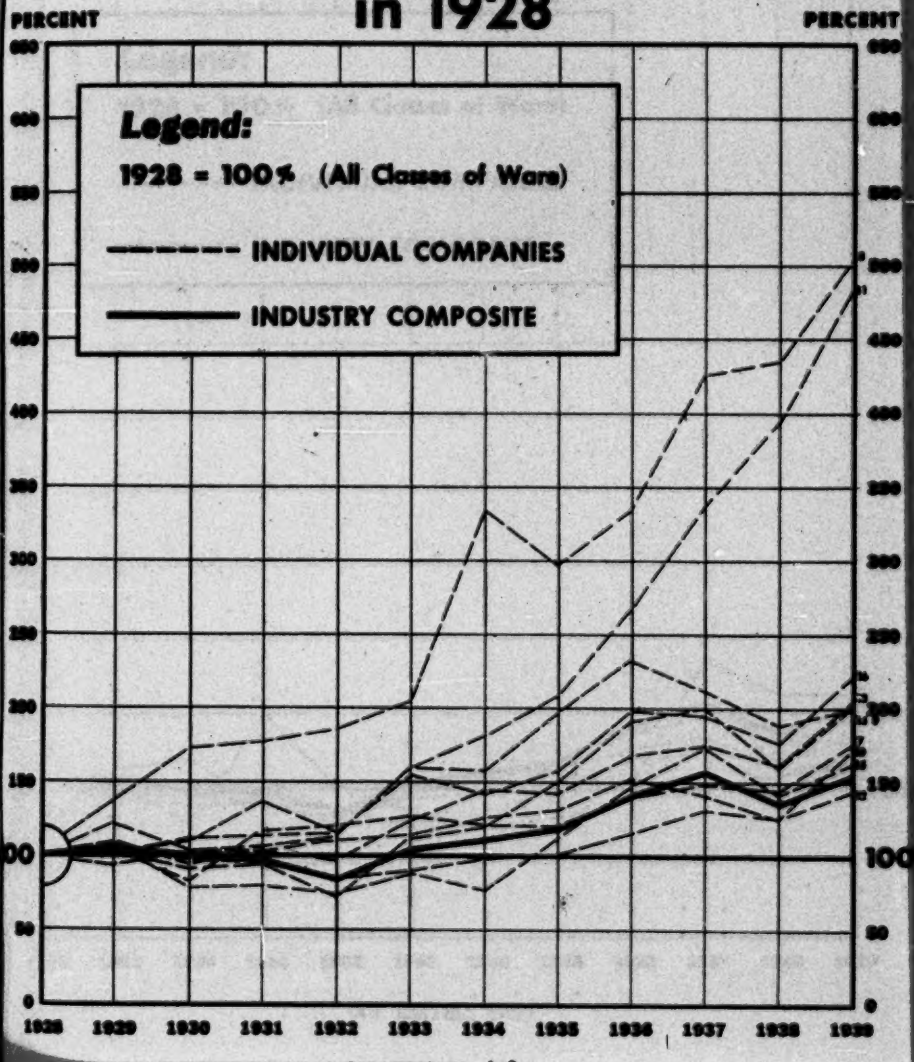


GOA EXHIBIT 6084

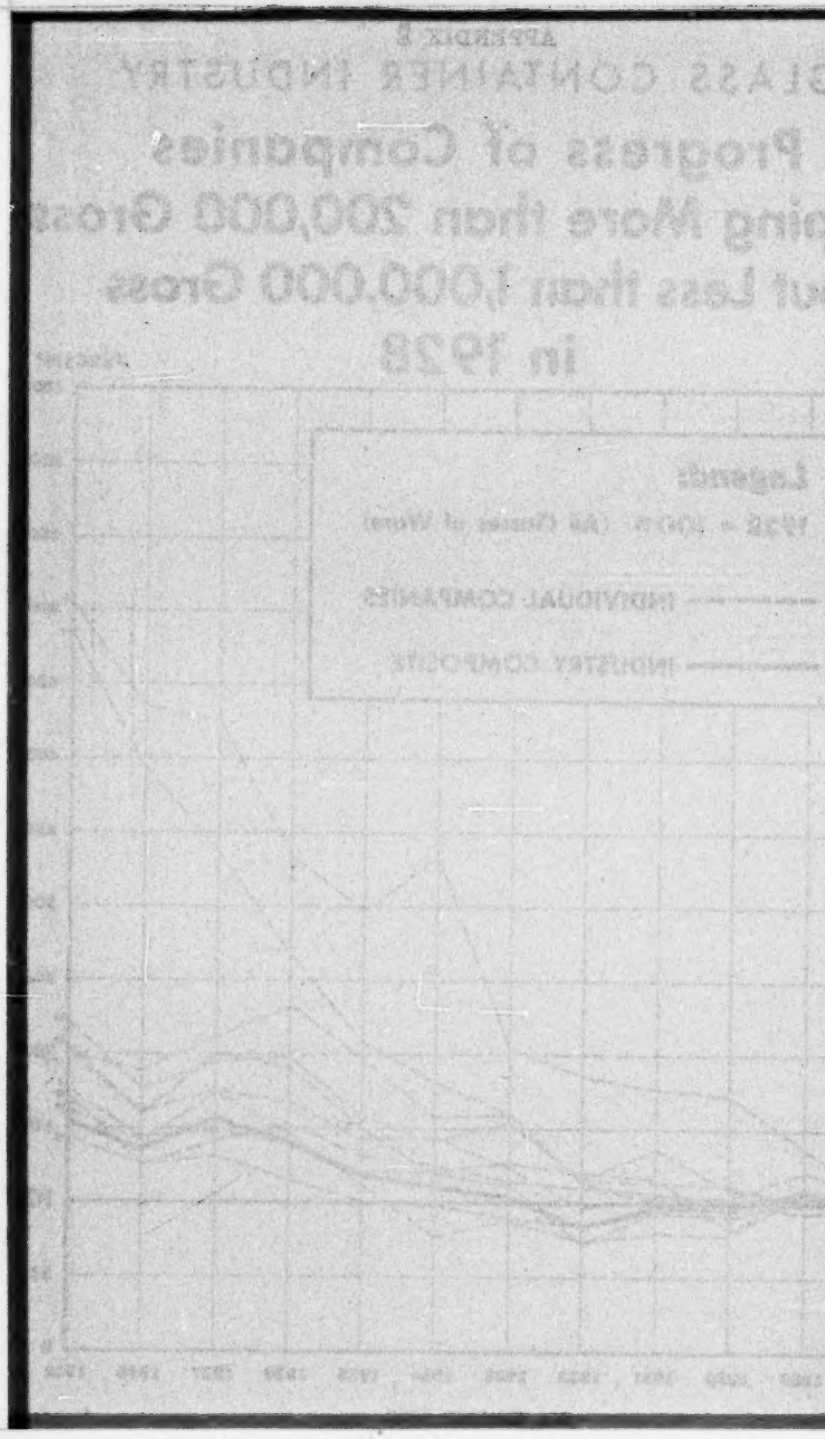
APPENDIX E

GLASS CONTAINER INDUSTRY

Progress of Companies Shipping More than 200,000 Gross but Less than 1,000,000 Gross in 1928



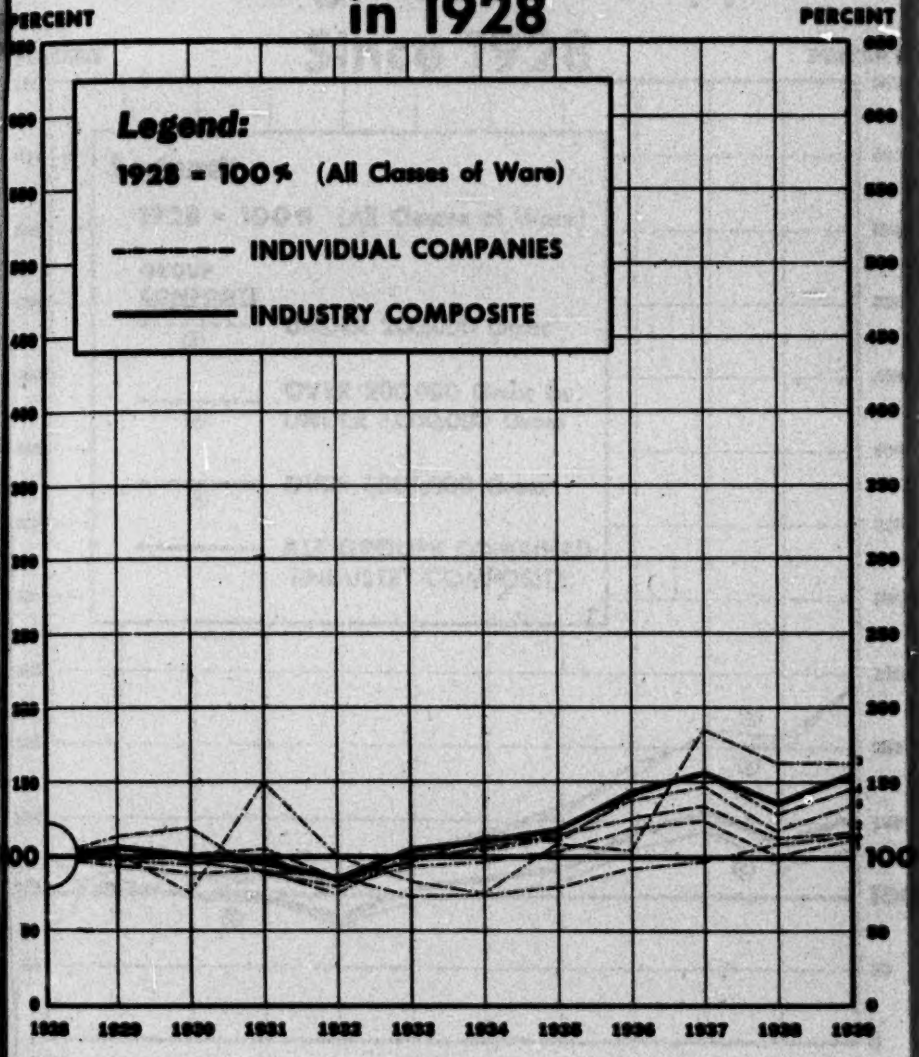
OCA EXHIBIT 6087



APPENDIX F

GLASS CONTAINER INDUSTRY

Progress of Companies Shipping More than 1,000,000 Gross in 1928

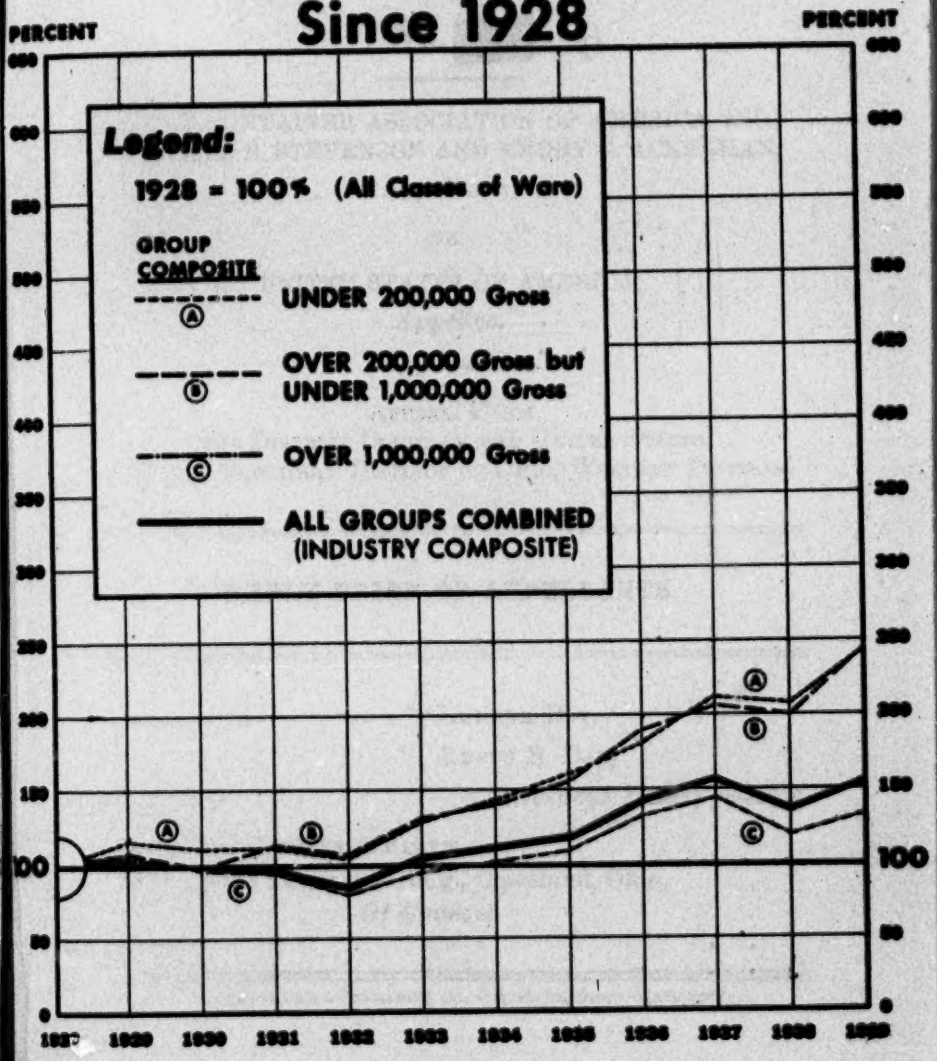


GCA EXHIBIT 6089

APPENDIX G

GLASS CONTAINER INDUSTRY

Progress of Companies Grouped According to Gross Shipped Since 1928



GCA EXHIBIT 6091